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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

MARCH FONG EU, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

JOSEPH REMCHO*
ROBIN B. JOHANSEN
LOWELL FINLEY
WENDY S. STRIMLING
REMCHO, JOHANSEN & PURCELL
220 Montgomery St., Suite 800
San Francisco, California 94104
Telephone: (415) 398-6230
Attorneys for Petitioners

*Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

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QUESTIONS PRESENTED

1. Whether California's term limits, which bar any legislator who has served more than four years in office from running for that office again for the rest of his or her life, violate the First and Fourteenth Amendment rights of candidates and their supporters.

2. Whether an initiative measure designed to remove California's legislative leadership and directed at specific incumbents is a state bill of attainder prohibited by article I, section 10 of the United States Constitution.

PARTIES

The parties to the proceeding in the California Supreme Court are set forth in the margin.[1]

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[1] Petitioners are the Legislature of the State of California; the Senate of the State of California; the Assembly of the State of California; David Roberti, President Pro Tempore of the California Senate; Willie L. Brown, Jr., Speaker of the Assembly; Kenneth L. Maddy, Republican Leader of the Senate; William A. Craven, Vice Chairman of the Senate Rules Committee; Senators Ed Davis, Cecil Green, Gary K. Hart, Bill Lockyer, Dan McCorquodale, Robert B. Presley and Diane Watson; Assembly members Bruce Bronzan, Peter R. Chacon, Jim Costa, Dan E. Hauser, Johan Klehs, Barbara Lee and Lucille Roybal-Allard; California Teachers Association; Black American Political Association of California; A. Alan Post, Alice Huffman, Aurora Castillo, Deborah Seiler, Marshall Sharpe, Percy Steele, Steve Thompson, and Newton Wallace, citizens and voters.

Respondents are March Fong Eu, Secretary of State of California; Gray Davis, State Controller; Board of Administration of the Public Employees Retirement System; and Conny McCormack, San Diego County Registrar of Voters.

In addition, the court below granted a group called Californians for a Citizen Government the right to intervene. Californians for a Citizen Government was the principal funding source and author of Proposition 140.

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OPINION BELOW

The decision of the California Supreme Court is reported as *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 816 P.2d 1309, 286 Cal.Rptr. 283 (1991). The decision is reproduced as Appendix A hereto at pages A-1 to A-57.

JURISDICTION

The decision of California's highest court was rendered on October 10, 1991. This Court's jurisdiction is founded on 28 U.S.C. section 1257(a).

RELEVANT FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

> the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment, section 1, to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, article I, section 10, clause 1:

> No state shall . . . pass any bill of attainder. . . .

California Constitution, article IV, section 2(a):

> The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. No Senator may serve more than 2 terms.
>
> The Assembly has a membership of 80 members elected for 2-year terms. No member of the Assembly may serve more than 3 terms.

California Constitution, article XX, section 7:

> The limitations . . . apply to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only one additional term.

STATEMENT OF THE CASE

Until 1990, California had never limited the number of terms of office that its state legislators could serve. As a result, it was common for each legislative house to have a mix of new and experienced legislators. The current Speaker of the Assembly, for

example, has twenty-seven years' Assembly service. The President Pro Tempore of the Senate has more than twenty years' Senate service.

On November 6, 1990, however, Californians passed Proposition 140, a measure setting term limits for state legislators and other statewide officials.[2]

Proposition 140 amended the California Constitution to set limits on the terms of Assembly members and Senators:

> The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. *No Senator may serve more than 2 terms.*
>
> The Assembly has a membership of 80 members elected for 2-year terms. *No member of the Assembly may serve more than 3 terms.*
>
> Cal. Const. art. IV, § 2(a) (amendments emphasized).

The effect is that no person who has served more than four years in office may run for another term in that office. The initiative also amended other sections of the Constitution to limit the Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer and Superintendent of Public Instruction to two terms in office. Proposition 140, §§ 6, 7, 8 (App. B at A-70 to A-71).

Proposition 140 also added section 7 to article XX of the California Constitution to limit the application of term limits to "terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only one additional term." Proposition 140, § 10 (App. B at A-71 to A-72). Thus, no current member of the Assembly may run for reelection after 1994 or serve in the Assembly past 1996. The last time that any current member of the Senate may run for

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[2] The full text of the measure appears as Appendix B, pages A-58 to A-72.

reelection is 1994;[3] for half of the Senators, 1992 will be the last year in which they can run for reelection. Proposition 140 also reduced the Legislature's total budget by 38 percent and prohibited legislators from participating in any retirement system other than the federal social security system.[4]

At the same time that the voters considered Proposition 140, they also considered Proposition 131. That measure contained a different feature that would have limited state legislators to a total of 12 *consecutive* years service. Thus, a member of the Assembly could serve 12 years, take a term off, and if the voters of her district were still favorably disposed, return to the Assembly for another 12 years. Proposition 131, California November 6, 1990 ballot. The voters rejected Proposition 131.

On February 21, 1991, the California Legislature and other interested parties, including elected state legislators and the citizens who desire to vote for them, challenged the measure in an original proceeding before the California Supreme Court. Petition for Writ of Mandate And/Or Prohibition, *Legislature of the State of California v. Eu*, 54 Cal.3d 492 (1991) (No. S019660) [hereinafter "Petition"]. Petitioners raised four federal causes of action.[5]

Petitioners alleged that "[t]he limits on the number of terms that may be served by members of the Legislature impermissibly

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[3] The sole exception is Senator Patrick Johnston, who was elected to fill less than half the term of former Senator John Garamendi and who may run again for two full terms.

[4] Cal. Const. art. IV, §§ 4.5, 7.5 (added by Proposition 140, §§ 4, 5 [App. B at A-70]). Proposition 140 received 52% of the vote. Cal. Sec. of State, Stmt. of Vote (Nov. 6, 1990) at 9. Those who voted for it constituted only 19% of those eligible to vote in California. *Id.* at iv, 65.

[5] Petitioners also challenged the initiative on three claims solely cognizable under state law. Petition, First, Second and Eighth Causes of Action. These claims were rejected by the California Supreme Court and are not at issue here. In addition, petitioners successfully challenged certain applications of the pension provisions on federal grounds not at issue here. Slip Op. at 4, App. A at A-3.

infringe upon petitioners' fundamental rights to run for elective office, to vote and to associate, rights protected under the First and Fourteenth Amendments to the Constitution of the United States." Petition at 20 (Third Cause of Action). Petitioners also alleged that "[t]he legislative term limit provisions of Proposition 140 unconstitutionally infringe upon the rights of petitioners . . . to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, under the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution, and under Article I, section 7 of the California Constitution." Petition at 21-22 (Fourth Cause of Action).

In their fifth cause of action petitioners alleged that "[t]he legislative term limits . . . constitute a bill of attainder prohibited by Article II [sic], section 10 of the Constitution of the United States." Petition at 23 (Fifth Cause of Action). The seventh cause of action alleged that the entire measure "violate[s] the Guaranty Clause of article IV, section 4 of the Constitution of the United States, which guarantees to every state a republican form of government." Petition at 24 (Seventh Cause of Action).

The California Supreme Court accepted original jurisdiction and set the case for full briefing and argument. On October 10, 1991, the California Supreme Court rendered its decision. *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 816 P.2d 1309, 286 Cal.Rptr. 283 (1991).[6] The court struck down the application of the ban on retirement participation as applied to sitting legislators, but upheld the budget reductions and the term limits against all challenges. Slip Op. at 4, 66, App. A at A-3, A-42.

On the First Amendment claim, the court held that as a matter of state law, "Proposition 140's term limitations extend over the lifetime of each affected office holder." Slip Op. at 13, App. A at A-9. The court nonetheless upheld the measure against the First Amendment and equal protection challenges, holding that "strict scrutiny" was not appropriate. Slip Op. at 31, App. A at A-20.

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[6] A copy of the Slip Opinion is reproduced as Appendix A hereto at A-1 to A-57.

The California court also rejected the bill of attainder argument, finding no case in which term limitations have been held to be a form of punishment. Slip Op. at 52-53, App. A at A-34. Finally, the California court dismissed as "conjectural and speculative" the claim that the measure would "radically undercut[ ] representative democracy." Slip Op. at 23, App. A at A-15.

REASONS FOR GRANTING THE WRIT

California's Proposition 140 steals from every citizen the right to vote for the candidate of his or her choice. Whether any limits on legislative terms can survive constitutional scrutiny, these clearly cannot. The initiative's stated goal of reducing the power of incumbents would have been served by other, less drastic means, including allowing individuals to run again after taking off a period of years or all or part of a term. As Respondent Eu conceded below, "a lifetime ban on candidacy is not essential to accomplish the voters' purpose. . . ." Brief of Respondent March Fong Eu at 26.

Moreover, this initiative was meant to punish individuals, not to reform the system. The ballot pamphlet said the measure was designed to "end the reign of the Legislature's powerful officers—the Assembly Speaker . . . and the Senate Leader. . . ." Appendix B. Campaign literature urged voters outside the Speaker's 17th Assembly District to "[j]oin with me in giving Willie Brown the 'Boot.' " Appendix D. Such efforts to punish public officials by barring them from further government service are flatly prohibited by the United States Constitution's ban on bills of attainder, whether or not in the guise of changing institutions of government.

The California Supreme Court wrongly decided important issues of federal law. The ruling illustrates the confusion that exists over the proper approach to election cases. Noting that it lacked "specific guidance from the high court," the California court used a balancing test that gave equal weight—or more so—to the proponents' asserted state interests without factoring in the heightened protection afforded the right to vote and the freedom

to associate by the First Amendment. Slip Op. at 33-35, App. A at A-21 to A-22.

The confusion is likely to spread as other courts confront the issue. Until the decision below, no court in this nation had ever ruled on the constitutionality of legislative term limits.[7] Like loyalty oaths in the 1950's, term limits have become a matter of increasing national interest. Colorado and Oklahoma passed legislative term limits in 1990.[8] A term limit initiative failed in Washington state this past November. Consecutive term limits for executive and legislative offices will be on the November, 1992

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[7] The West Virginia and Georgia Supreme Courts have upheld *consecutive* term limits for *Governor*. *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom. Moore v. McCartney*, 425 U.S. 946 (1976); *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, *cert. denied* 397 U.S. 149 (1970).

[8] The Colorado Constitution was amended to provide, in pertinent part:

> [N]o senator shall serve more than two consecutive terms in the [state] senate, and no representative shall serve more than four consecutive terms in the [state] house of representatives. This limitation on the number of terms shall apply to terms of office beginning on or after January 1, 1991. . . . Terms are considered consecutive unless they are at least four years apart.
>
> Colo. Const. art. V, § 3(2) (amended 1990).

The Oklahoma Constitution was amended to provide, in pertinent part:

> Any member of the Legislature who is elected to office after the effective date of this amendment shall be eligible to serve no more than 12 years in the Oklahoma State Legislature. Years in Legislative office need not be consecutive and years of service in both the Senate and the House of Representatives shall be added together and included in determining the total number of Legislative years in office. . . . Any member who is serving a Legislative term in office or who has been elected or appointed to serve a term in office on the effective date hereof shall be entitled to complete his or her term and shall be eligible to serve an additional 12 years thereafter. . . .
>
> Okla. Const. art. V, § 17A (amended 1990).

ballot in Florida, after the Florida Supreme Court declined to issue an advisory opinion on their constitutionality. *In re: Advisory Opinion to The Attorney General—Limited Political Terms in Certain Elective Offices*, No. 78,647 (Fla. Dec. 19, 1991). Term limits for members of Congress and for local office are now being circulated in California by the same people who successfully circulated Proposition 140.[9] Term limits are a matter of immense national concern, and, as we discuss below, the constitutional issues are substantial.

I

THE STANDARDS TO BE APPLIED TO TERM LIMITS ARE URGENTLY IN NEED OF CLARIFICATION

In choosing the standards to be used in evaluating California's term limits, the California court, like others before it, evidenced great confusion about the appropriate standard of review in elections cases. On the one hand, this Court's most recent statement of the test clearly called for strict scrutiny.

> To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest.
>
> *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989) (citations omitted).

Other cases, some not even discussed by the California court, not only applied the narrowly tailored test, but employed "least drastic alternative" language. In *Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173 (1979), for example, this Court required a compelling state interest and noted that

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[9] Transmittal Letters #551 (Term Limits, Board of Supervisors), #552 (Congressional Term Limits), #553 (Congressional Candidates, Limitations), December 12, 1991 to Registrars of Voters from Secretary of State.

finding "the least drastic means" was "particularly important where restrictions on access to the ballot are involved." 440 U.S. at 185-86.

The California court, however, attempted to apply the language used in *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

> "[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> 460 U.S. at 789.

In doing so, the court ignored the discussion of least drastic alternatives at the close of the *Anderson* majority opinion. 460 U.S. at 806.[10] It apparently tried to apply the balancing test of *Anderson*, without recognizing that *Anderson* is a form of strict scrutiny. *See, e.g., Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., finding phrases such as "least drastic alternative" unhelpful, but concurring in use of strict scrutiny). Instead, it cited with approval the reasoning that the West Virginia Supreme Court used in applying a rational basis test to its consecutive gubernatorial limits. *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607, 611, *appeal dismissed sub nom. Moore v. McCartney*, 425 U.S. 946 (1976).

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[10] The *Anderson* Court wrote:

"For even when pursuing a legitimate state interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it *a less drastic way* of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." 460 U.S. at 806 (quotations and citations omitted; emphasis added).

The California Supreme Court recognized that it was on uncertain ground. It attempted to apply *Anderson*, "[l]acking any more specific guidance from the high court, . . ." Slip. Op. at 34, App. A at A-22. It noted that "it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure." Slip. Op. at 39, App. A at A-25. It dismissed the strict scrutiny standard of *Eu v. San Francisco County Democratic Central Committee*, declaring that Proposition 140 "does not affect speech interests" and that it "impacts all political parties on an equal basis." Slip Op. at 31, App. A at A-20.

The standards to be applied in election cases are critically in need of clarification from this Court. The current rash of legislative term limits makes it especially appropriate to resolve those standards in the context of this case.

II

BY ANY STANDARD CALIFORNIA'S TERM LIMITS VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

In 1996, California State Senator Ed Davis' four-year Senate term will expire. His many supporters in the 19th Senate District want him to run for another term. Davis, a former Chief of Police of the City of Los Angeles, is a highly popular Republican incumbent who under normal circumstances could be expected to run and easily win reelection in his relatively conservative Senate District. After 1992, however, Senator Davis can never run for the Senate again.

Senator Davis has committed no felony, nor have the constituents who would vote for him. California has no age requirement for legislators, nor does it have a durational residency requirement of any significance. Senator Davis is barred from running—and his supporters are barred from voting for him—solely because he and his supporters have been caught up in the national movement for term limits.

Senator Davis' supporters share his political views and believe that he is the right person to see that those views are reflected in the work of the Legislature. By voting for him, they join with others to see that he serves in the Senate. In large part, they vote for him because he is electable. The term limits that apply to Senator Davis thus infringe directly on their right to vote and their right to associate with others to keep Mr. Davis in office and be represented by him.

Proposition 140 bars Petitioner Melissa Eddy and the thousands of other citizens who voted for Senator Davis in 1988 from the opportunity to vote for him for Senate in 1996 *or ever again*. Indeed, the rule of Proposition 140 can be accurately rephrased as follows:

> No person with more than four years' experience in the Assembly may run for the Assembly and no person with more than four years' experience in the Senate may run for the Senate.

These term limits impermissibly restrict the political activity of incumbent legislators and their supporters. They create invidious classifications that deny equal protection of the law. Yet, they are neither necessary nor narrowly tailored to meet their stated purposes.[11]

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[11] Petitioners here challenge only the limits on legislative terms, which are different in crucial respects from the limits placed on executive branch offices such as Governor and Attorney General. The main difference is in the body of voters who made the decision. Until Proposition 140, the choice of when to remove an incumbent legislator rested with the voters of the district alone. For the first time in California history, voters in other parts of the state told those in particular districts that they will no longer be able to decide whether to vote an incumbent out of office; the rest of the state will make that decision for them.

The case is entirely different for statewide officers. The same voters who elected Governor Pete Wilson were allowed to decide how long he will serve, a principle that is far more fair than telling the voters of an Assembly District that they may not reelect a legislator who has served them well for many years.

A. Proposition 140 Impermissibly Restricts Political Speech And Activity

The rights to speak freely and to associate find their greatest protection within the context of a campaign for public office:

> [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.
>
> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

Under Proposition 140, these constitutional guarantees are denied to millions of Californians. The very reason for which many voters are attracted to their representative—the fact that he has served them well in the past—makes him ineligible to be their candidate again. They can neither band together to support his candidacy nor advocate it effectively to other voters. Once he has served his allotted terms, he is simply not available for that office and never will be again.

The California Supreme Court sought to minimize the impact of these restrictions by stating that "[v]oters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may desire in a public officeholder." Slip Op. at 38, App. A at A-24. The comment glosses over the fact that a significant attribute many voters desire is experience in office—the kind that insures that a legislator or her staff can refer a constituent to the appropriate state agency when the need arises or be able to advocate effectively for her district in committee or on the floor. Candidates with that experience—the kind that gets things done—are simply taken out of the available pool, and their supporters are told that they may not participate in the election at

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For these reasons, and because the state interests supposedly served by the measure differ markedly as applied to the executive branch, the issues raised by this petition do not encompass the term limits imposed by Proposition 140 on statewide office. We note, however, that many of the same burdens and lack of a narrowly tailored remedy may apply to the executive as well as legislative term limits contained in the measure.

all. A more thorough restriction on the rights to speak freely and to associate can scarcely be imagined.[12]

The measure clearly was an effort to remove incumbents based on the content of their message and the way in which they vote. For example, the Argument for Proposition 140 announced that "Proposition 140 will put an end to the life-time legislators, who have developed cozy relationships with special interests." Ballot Argument in Favor of Proposition 140, November 6, 1990 Ballot, App. B at A-62.[13] Had Proposition 140 decreed that no one who had supported special interests such as California's educators or its peace officers could be a candidate for office, its facial invalidity would have been clear. That, however, is precisely what these term limits do. Anyone with fresh ideas is welcome. Those whose "old ideas" are the fruits of experience are not.

But California can no more choose the type of legislator the citizens of a particular district send to Sacramento than Chicago could choose what type of picketing its citizens engage in. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its

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[12] The restriction is similar to, but even more extreme than, the content-based restriction that this Court recently struck down in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 60 U.S.L.W. 4029 (U.S., Dec. 10, 1991). That case involved New York's so-called Son of Sam law, which required criminals to escrow the profits from publications about their crime, for use should victims prevail in civil litigation. Although New York's law did not prohibit writing about the crime, it provided a strong disincentive to do so.

California's term limits do much the same thing. The measure muffles the speech of only experienced candidates by saying that they cannot be candidates at all. They are free to speak, but have no incentive, nor the financial means to do so.

[13] As declarations filed below demonstrated, the measure is likely to have precisely the opposite result, because inexperienced legislators cannot compete with knowledgeable lobbyists. *See* Appendix to Memorandum of Points and Authorities in Support of Petition for Writ of Mandate And/Or Prohibition, Exhs. 3, 4, 5, 17, 18, and 21 below.

ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), this Court struck down a ban on political party endorsements in primary elections, noting that the ban implicated not just speech, but the right of association. *Id.* at 224. In words highly applicable to term limitations, the Court noted that freedom of association includes the right "to select a standard bearer who best represents the party's ideologies and preferences." *Id.* (quotation omitted).

In addition to the ban on political endorsements, the plaintiffs in *Eu* challenged a series of restrictions on the internal operation of political parties, including a state-imposed requirement that after two years the party chair must relinquish her seat to a chair from another part of the state. *Eu*, 489 U.S. at 218 n.7, 230. This Court struck the provision as violative of the associational rights of party members:

> By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message.
>
> *Id.* at 231 n.21.

That is precisely what term limits do. The persons who will be ineligible to run for office have certain identified messages and a clear constituency. Term limits silence those messages. Other similar messages may surface, but they will not be the same, and the choice of messenger will have been made not by parties and other political groups, but by the State.

B. Proposition 140 Invidiously Discriminates Against Particular Classes of Voters

It is a fact of American political life that people coalesce behind a particular candidate as much as or even more than they do behind a particular issue or political party. In 1980, Ronald Reagan, a Republican, won the votes of millions of registered Democrats because they liked him and liked what he said. In that same election, millions of Republicans voted for Representative

John Anderson, a Republican who ran as an independent candidate to provide an alternative to Mr. Reagan. *Anderson v. Celebrezze*, 460 U.S. 780, 782-84 (1983).

The Democrats who supported Ronald Reagan formed a political group defined solely by their candidate; so did all of the voters who supported John Anderson. Mr. Anderson's supporters were, this Court found, an identifiable political group entitled to heightened protection under the First Amendment:

> As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.
>
> *Anderson v. Celebrezze*, 460 U.S. at 793.

So it is here. Proposition 140 creates a class of voters who want experienced legislators and, in particular districts, classes of those who support a particular experienced legislator. Those classes are treated differently from the class of people who would prefer their legislators to come unencumbered by the knowledge and experience to be gained in the Senate or Assembly.

Similarly, experienced candidates form a class that is treated differently from all other candidates. It is the class of candidates —incumbent or non-incumbent—with more than four years' experience; that class is permanently barred from running for the office. Once a person joins that class, he or she is there forever. It does not matter whether the Assembly terms were served as an independent or as a minority party member, out of the legislative mainstream. Nor does it matter that the legislator seeks to return after a twenty-year hiatus, during which any ties to the establishment have long been dissolved.[14]

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[14] This permanent disability thus distinguishes Proposition 140 from what have been termed "ballot access" cases including *Burdick v. Takushi*, 937 F.2d 415 (9th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3418 (U.S. Dec. 9, 1991) (No. 91-535). Those cases involve in one form or another barriers to access to the ballot that could at least theoretically be surmounted after the passage of time, or by using other avenues of access to the ballot, as in *Burdick*. 937 F.2d at 419, n.2. *See, e.g.*,

This is invidious discrimination at its worst. In other contexts, this Court has not hesitated to find an equal protection violation if "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973). *Accord Davis v. Bandemer*, 478 U.S. 109, 137 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

C. Under Any Test Proposition 140 Is Neither Necessary Nor Narrowly Tailored

Although the California court misperceived the appropriate test, the result should have been the same whether it used the traditional compelling state interest test reaffirmed most recently in *Eu* or whether it—inappropriately in our view—used a balancing test that might appear to put less burden on the state.

The first inquiry is always the interest asserted by the State in support of its regulation. That interest must be substantial, and it is the "precise interests" asserted by the State that must justify the statute; other interests may not be supplied or conjectured. *Anderson*, 460 U.S. at 788-89.

The findings and declarations contained in Proposition 140 claim two interests to be served by the measure. The first is to

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Anderson v. Celebrezze, 460 U.S. 480 (1983) (striking early filing deadline requirement for independent candidates); *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding requirement that judge must wait until term expires before running for legislative office); *Storer v. Brown*, 415 U.S. 724 (1974) (upholding party disaffiliation requirements for candidates); *Bullock v. Carter*, 405 U.S. 134 (1972) (striking candidate filing fee system); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congressional act setting voting age for national elections and invalidating act as applied to voters in state and local elections); *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking signature requirements for new parties to qualify on ballot). Even the poverty barrier struck down in *Lubin v. Panish*, 415 U.S. 709 (1974), was not immutable. California's ban extends to running as a member of a party, as an independent, or even as a write-in candidate.

"restore a free and democratic system of fair elections;" the second is to "encourage qualified candidates to seek public office." Proposition 140, § 2 (App. B at A-68 to A-69). The method used to achieve those purposes is to limit the "powers of incumbency" (*id.*) by imposing term limits, limiting retirement benefits, and reducing legislative staff. Nowhere is it explained or even suggested how these means are related to the asserted interests,[15] and on closer analysis, there is very little legislative "fit" between these ends and means.

The stated justifications are circular and meaningless. To say that unlimited terms "contribute heavily to the extremely high number of incumbents who are reelected" (*id.*) merely states the obvious: incumbents cannot be reelected if they cannot run for election. It is hardly an "unfair incumbent advantage" merely to be permitted to run.

It is certainly true that a ban on incumbents seeking reelection will result in others serving in that office—someone must represent each of the Assembly and Senate districts. However, nothing offered by the proponents of Proposition 140 even suggests how this turnover of representation "restore[s] a free and democratic system of fair elections." If anything, the system is less democratic and less free as a result of the term limitations because they establish an absolute ban on certain individuals running for election and on voters supporting their chosen representative.

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[15] State assertions of compelling state interest should be taken with a rather large dose of salt. In *Storer v. Brown*, 415 U.S. 724 (1974), California successfully argued that disaffiliation requirements were necessary in order to promote "the stability of its political system." 415 U.S. at 736. Here, California argues precisely the opposite: term limits are necessary to promote political instability. Although Californians are free to change their minds, the sharp differences between these asserted "compelling" state interests illustrates the hidden agenda that so often goes unarticulated in these cases. In *Storer* the agenda was to minimize attacks on incumbents. Here, the agenda—as discussed in the bill of attainder section that follows—was to remove certain current officeholders who were immensely popular in their own districts, but not popular statewide.

Nor is it the case that the term limits will "encourage qualified candidates to seek public office" in either the short or long term. In the short term, few prospective candidates, qualified or not, are likely to challenge a popular incumbent when they need only wait one more term to enter a race from which that incumbent has been eliminated. Thus, term limitations discourage one of the very interests they supposedly serve.

In the long run, the term limitations permanently ban those who are arguably the most qualified candidates—those whose experience and expertise allows them to represent their constituencies most effectively. Nothing offered by the proponents of Proposition 140 suggests why or how experienced legislators are less qualified than others to represent California voters, yet the mere fact of experience is sufficient under the initiative to disqualify an otherwise (and often overwhelmingly) qualified candidate.

Even if the fit between means and ends were better, the interests supposedly served can hardly be called compelling. What is the societal interest in bringing in new participants, not in the traditional gradual way as incumbents are defeated and retired, but in massive numbers as the incumbents are purged? The newcomers bring in perspectives that are different from those of incumbents, but not necessarily better for the state or their constituents. There have always been newcomers. Proposition 140 creates a Legislature whose members are *all* newcomers. What is the value of having a Legislature run by a Speaker or a President Pro Tempore who begins his term with at most four years of legislative experience? And what is the value of a Legislature that begins each term with no member having more than four years' experience and, on a cyclical basis, with most members having no experience at all? Indeed, the evidence presented below was all to the contrary. At least a dozen legislators and experts filed uncontested affidavits attesting to the harm to the operation of California government that would be caused by creating a legislature of lame ducks.[16]

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[16] *See* Appendix to Memorandum of Points and Authorities in Support of Petition for Writ of Mandate And/Or Prohibition. Lieutenant

Finally, there are clearly less drastic means that will *better* serve the interests offered by proponents. California's Constitution already contains alternative means for removing incumbents who do not serve their constituents. They fail to win reelection, or they are recalled. And when public dissatisfaction includes the Legislature as a whole, the people have turned out large numbers at once.[17] Concerns about powers of incumbency could also have been met by more direct limits on use of state resources.

The most telling feature of Proposition 140, however, is its lifetime ban on serving in office. Whatever the goals of reducing the power of incumbency, they are achieved as soon as the officeholder leaves office. The next time around, a new person is the incumbent. The former officeholder has none of the powers of office so apparently feared by the drafters. The former incumbent has only name recognition and a loyal group of constituents who believe that he or she is the one they want to represent them. No opportunity to use or misuse public funds presents itself. No public staff is available for even the most mundane of tasks.

Even California's Attorney General and Secretary of State, who vigorously defended the measure, agreed that the purpose of avoiding the advantages of incumbency is completely achieved by forcing a legislator to take one term off before being eligible to run again. Recognizing the First Amendment implications of the

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Governor Leo McCarthy, for example, was Speaker of the Assembly from 1974 to 1980. He knows both the legislative and executive branches well, and he knows the impact such changes will bring:

> The loss of institutional memory and expertise resulting from term limits on legislators, along with the loss of staff technical assistance, drastically undermines the Legislature's ability to act as a check on the executive branch of government. . . . Proposition 140 creates a legislature that will be largely reactive, without the ability to adequately respond to executive initiatives or to offer any but the simplest policy initiatives of its own.

Id., Exh. 18, Declaration of Leo McCarthy, ¶ 4.

[17] *See* F. Hichborn, *Story of the Session of the California Legislature of 1911*, 11 (1911) ("The election of Hiram W. Johnson, Governor of California, carried with it the defeat of the 'machine' members of Senate and Assembly who had for years dominated the Legislature.").

measure, the Attorney General argued that it should be interpreted as a ban on consecutive terms rather than the lifetime ban its proponents originally conceived:

> Respondent agrees with petitioners that a lifetime ban on candidacy is not essential to accomplish the voters' purpose of preventing the development of an entrenched and self-perpetuating political machine in the Legislature. *Reasonably construed to require only a hiatus in multiple successive terms of office, Proposition 140 accomplished the voters' evident purpose in a manner that is less intrusive of constitutionally protected rights.*
>
> Brief of Respondent March Fong Eu at 26 (citation omitted, emphasis added).[18]

The language of the measure itself and in the ballot arguments presented to the voters admitted of no construction other than a lifetime ban, however. Slip Op. at 9-13, App. A at A-6 to A-9. Having so held, the California Supreme Court should have declared the term limits unconstitutional.

III

PROPOSITION 140 IS AN UNCONSTITUTIONAL BILL OF ATTAINDER

Article I, section 10, clause 1 of the United States Constitution provides:

> No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. . . .
>
> U.S. Const. art. I, § 10, cl. 1.

This Court has defined a bill of attainder as a "legislative punishment, of any form or severity, of specifically designated

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[18] Elsewhere, Respondent Eu pointed out that she was not specifically conceding that a lifetime ban would be unconstitutional. "If this Court should find that Proposition 140 must be construed to impose a lifetime ban . . . respondent submits that this Court *may* still find Proposition 140 to be constitutional." *Id.* at 39 n.21 (emphasis added).

persons or groups" (*United States v. Brown*, 381 U.S. 437, 447 (1965)), and as a "legislative act[], no matter what [its] form, that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946).

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. *Disqualification from office may be punishment*, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment."
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> *United States v. Brown*, 381 U.S. at 448 (emphasis added) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867)); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).[19]

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), this Court struck down as a bill of attainder several provisions of the Missouri Constitution adopted by the people of that state shortly after the Civil War. *Id.* at 322-25. Those provisions required citizens to take an oath that they had not engaged in certain acts supporting the Confederacy in the recently concluded Civil War, or even manifested sympathy for the Confederate cause. *Id.* at 316-18. Any person who failed to take the oath was barred from a number of occupations, including holding state or local public office. *Id.* This Court struck down the Missouri constitutional

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[19] *See also Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977) ("Our country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal.").

amendment as a bill of attainder because of its punitive motivation.[20]

On the same day that it decided *Cummings v. Missouri*, the Court invalidated a similar expurgatory oath enacted by Congress as a condition for admission of attorneys to practice law before this Court. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867). As in *Cummings*, the Court pierced through arguments that the oath requirement constituted mere qualification for office, a matter within the legislative power:

> The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but *whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution.*
>
> *Ex parte Garland*, 71 U.S. at 379-80 (emphasis added).

Modern bill of attainder decisions have built upon the foundation laid by the post-Civil War cases. *See United States v. Brown*, 381 U.S. 437 (1965) (striking down disqualification of current and former members of the Communist Party from serving as union officers); *United States v. Lovett*, 328 U.S. 303 (1946) (striking down a bar to payment of compensation to three named federal employees).[21]

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[20] Laws adopted by popular vote, like the initiative constitutional amendment at issue here, clearly qualify as "legislative acts" subject to the bill of attainder clause. *See Cummings*, 71 U.S. at 323.

[21] In 1979, the Eighth Circuit held that two municipal ordinances, one of which was intended to force an elected city attorney to forfeit his office, were bills of attainder. *Crain v. City of Mountain Home, Ark.*, 611 F.2d 726, 729 (8th Cir. 1979). The city council of Mountain Home, Arkansas had appointed Crain to fill the unexpired term of the previous elected city attorney. On the eve of the election at which Crain ran unopposed for the next term, the city council requested Crain's resignation, but he refused. The council immediately enacted two ordinances.

Proposition 140 on its face applies to all future incumbents. The motivation for its adoption, however, was punishment of "named or described persons"—present incumbents. By contrast, the 22nd Amendment to the Constitution of the United States evidenced clear congressional sensitivity to the issue of punishment by excepting incumbent President Harry Truman from its restrictions. The exception followed floor debate over whether the proposed amendment constituted partisan retaliation and punished President Truman for Franklin Roosevelt's long tenure in office. *See* 93 Cong. Rec. 842-56, 1938-41, 1947, 1955-56, 2389 (1947).

Examination of the ballot pamphlet that produced Proposition 140 leaves little doubt about the punitive intent of the measure:

> Proposition 140 will end the reign of the Legislature's powerful officers—the Assembly Speaker (first elected a quarter of a century ago) and the Senate Leader (now into his third decade in the Legislature). . . .
>
> Argument in Favor of Proposition 140, App. B at A- 62.

Although the proponents' ire was directed at current long-term members in general, their greatest wrath was reserved for petitioner Willie Brown. In a letter soliciting contributions to pay for the campaign in favor of Proposition 140, the proponents wrote:

> When this proposition passes we will truly be able to replace liberal politicians, especially those who have made a career out of sitting in the seats of power:
>
> - Willie Brown, elected in 1964—26 years in the Assembly
> - David Roberti, elected in 1971—19 years in the Senate

The first removed Crain from office for the remainder of the unexpired term. The second ordinance reduced the salary of the city attorney for the next and all future terms to $1.00 per year and prohibited the city attorney from engaging in the private practice of law. *Crain*, 611 F.2d at 727-28. The Eighth Circuit had little difficulty in concluding that both ordinances were bills of attainder. *Id.* at 729.

- John Vasconcellos, elected in 1966—24 years in the Assembly[22]

The letter ends with the following post script: "P.S. Just think, when TERM LIMITS passes, it will be 'so long Willie Brown.' Join with me in giving Willie Brown the 'Boot.' " App. D at A-77. The three-page letter targets Assembly Speaker Willie Brown by name no fewer than nine times, Senate President Pro Tem David Roberti twice. App. D at A-74 to A-77. A bumper sticker (reproduced here as App. C at A-73) made the same point.[23]

When sitting legislators are singled out for punishment—in this case future disqualification from office—the legislation is an unconstitutional bill of attainder.[24] The deliberate selection of a lifetime ban on running for reelection makes this purpose even more plain. The punishment is all the worse because these are public officials who are penalized for speech and conduct in office. It is one thing for the voters in a district to reject an offending official by removing him from office in the ordinary course of an

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[22] Letter from Ted Costa, filed with Declaration of Lowell Finley, Appendix to Memorandum of Points and Authorities in Support of Petition, Exh. 10 below (Reproduced as App. D hereto at A-74 to A-77).

[23] Where a law is challenged as a bill of attainder, evidence of punitive motive is clearly relevant and admissible. *Nixon v. Administrator of General Services*, 433 U.S. at 478. Materials placed before the voters during a campaign are properly considered in determining what the voters understood to be the purpose of an initiative measure. *See Brosnahan v. Brown*, 32 Cal.3d 236, 252, 651 P.2d 274, 283, 186 Cal.Rptr. 30, 39 (1982).

[24] In addition to the term limits, Proposition 140 singled out sitting legislators for an additional punishment: immediate termination of their rights in the Legislators' Retirement System. Proposition 140, § 4 (App. B at A-70). Proposition 140 left untouched the comparable rights of the Governor and others in the Legislators' Retirement System. *See Cal.* Gov't. Code § 9355.4. Although the California Supreme Court struck down this provision on other grounds (Slip Op. at 53-67, App. A at A-34 to A-43), its inclusion further evidences the punitive nature of the measure.

election. It is quite another for the voters of the state to punish him and his constituents by barring him from ever holding that office again.

Any effort to limit terms carries with it the possibility that, as here, the real goal is punishment, not reform. This Court should grant the petition for writ of certiorari to determine under what circumstances, if any, legislative term limits may be imposed on current incumbents.

CONCLUSION

Certiorari should be granted to vindicate the speech and associational rights of millions of California voters and to provide guidance to the several states on whether and to what extent they may muffle that speech and punish incumbents in the name of term limits.

DATED: January 6, 1992.

Respectfully submitted,

JOSEPH REMCHO*
ROBIN B. JOHANSEN
LOWELL FINLEY
WENDY S. STRIMLING
REMCHO, JOHANSEN & PURCELL
Attorneys for Petitioners

* Counsel of Record

Appendix A

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA et al.,
Petitioners,

v.

MARCH FONG EU, as Secretary of State, etc., et. al.,
Respondents;

CALIFORNIANS FOR A CITIZEN GOVERNMENT,
Intervener.

[FILED OCT 10, 1991]

S019660

In this proceeding, we consider constitutional challenges to an initiative measure adopted at the November 6, 1990, General Election. This measure, entitled by its framers "The Political Reform Act of 1990," was designated on the ballot as Proposition 140. Its stated purpose is to "restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" by limiting "the powers of incumbency." (Cal. Const., art. IV, § 1.5, added by Prop. 140.) The measure seeks to accomplish these goals by these three separate reforms: "Retirement benefits [of legislators] must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served." (*Ibid.*)

Petitioners herein include the California Legislature (both Senate and Assembly), certain individual legislators from both houses, and various citizens, voters and taxpayers. Petitioners jointly assert a variety of challenges to the constitutionality of Proposition 140.

Respondents are various public officials (including the Secretary of State, the state Controller, and the Board of Administration of the Public Employees Retirement System [PERS]) responsible for implementing, enforcing or applying the new

measure. Intervener, Californians for a Citizen Government, is the organization that sponsored Proposition 140. Several amici curiae have filed briefs supporting the various parties.

Only intervener (represented by the Pacific Legal Foundation) and respondent Secretary of State (represented by the Attorney General) have filed briefs adverse to petitioners. Respondent state Controller remains neutral, while respondent PERS supports petitioners' challenge to the pension limitations of Proposition 140, but takes no position on the remaining issues. Nonetheless, for convenience, we sometimes refer to intervener and respondent Secretary of State jointly as "respondents."

The petition for mandate sought original relief in this court. Although we customarily decline to exercise such jurisdiction, preferring initial disposition by the lower courts, the present case involves issues of sufficient public importance to justify departing from our usual course. As we recently observed in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 (assessing the constitutionality of Proposition 115, an initiative measure adopted at the June 1990 Primary Election), quoting from an earlier case, " 'It is uniformly agreed that the issues are of great public importance and should be resolved promptly. Accordingly, under well settled principles, it is appropriate that we exercise our original jurisdiction. [Citations.]' . . . " (See also *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-265.)

Pending our review of the issues, on June 14, 1991, we temporarily stayed operation of section 5 of Proposition 115, which imposes budgetary restrictions on the Legislature, as hereafter discussed.

The principles that guide us in evaluating the validity of initiative measures such as Proposition 140 are likewise well settled. Although the legislative power under our state Constitution is vested in the Legislature, "the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) Accordingly, the initiative power must be *liberally construed* to promote the democratic process. (*Raven v. Deukmejian, supra*, 52 Cal.3d at p. 341.) Indeed, it is our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable

doubts in favor of its exercise. (*Ibid.*, and cases cited.) As with statutes adopted by the Legislature, all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814 [evaluating the constitutionality of Prop. 103, an insurance rate initiative measure adopted at the Nov. 1988 Gen. Elec.].)

As will appear, we conclude that although the pension restrictions of Proposition 140 are invalid as to incumbent legislators, the measure is constitutionally valid in all other respects. Before addressing petitioners' challenges, we briefly outline the basic provisions of the new measure, which consists entirely of various amendments to the state Constitution.

I

SUMMARY OF PROPOSITION 140

A. Statement of Purpose and Findings

Section 1.5 is added to article IV of the Constitution (the "Legislative" article), to set forth various findings and statements of the framers' intent. In pertinent part, this introductory provision recites that although "the Founding Fathers established a system of representative government based upon free, fair, and competitive elections," nonetheless an "extremely high number of incumbents" are reelected by reason of "the ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense. . . ."

The introductory statement continues by noting that "These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." The statement concludes by stating that, "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and

declare that the powers of incumbency must be limited," as provided by the substantive amendments we now discuss.

B. Term Limitations

The measure imposes specific term limitations for state legislators and various state constitutional officers. Persons elected or appointed on or after November 6, 1990, to the office of Governor (Cal. Const., art. V, § 2), Lieutenant Governor (*id.*, § 11), Attorney General (*ibid.*), Controller (*ibid.*), Secretary of State (*ibid.*), Treasurer (*ibid.*), Superintendent of Public Instruction (*id.*, art. IX, § 2), or to the State Board of Equalization (*id.*, art. XIII, § 17), or the state Senate (*id.*, art. IV, § 2, subd. (a)), are limited to two terms. Members of the Assembly are limited to three terms (*ibid.*).

Section 7 is added to article XX of the Constitution (the "Miscellaneous Subjects" article), to explain that the foregoing term limitations "apply only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only one additional term," and that the foregoing term limits "shall not apply to any unexpired term to which a person is elected or appointed if the remainder of the term is less than half of the full term."

C. Budgetary Limitations

The measure imposes a budgetary limitation for the Legislature. Section 7.5 is added to article IV of the Constitution to provide that, for the forthcoming fiscal year, "the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature may not exceed" $950,000 "per member" for that fiscal year, or 80 percent of the amount of money expended for such purposes in the preceding year, whichever is less.

Additionally, new section 7.5 of article IV of the Constitution provides that, for each fiscal year thereafter, the total aggregate expenditures may not exceed the amount expended during the previous year, "adjusted and compounded by an amount equal to

the percentage increase in the appropriations limit for the state established pursuant to Article XIII B" of the Constitution.

D. Pension Limitations

Finally, the measure imposes limitations on legislators' pension rights. New section 4.5 is added to article IV of the Constitution to provide that the state will contribute the employer's share to the federal Social Security system on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," but "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision further provides that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law . . . , but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security . . . ."

Respondent state Controller confirms that, as of the effective date of Proposition 140, he ceased making deductions from the salaries of incumbent legislators for the Legislators' Retirement Fund in connection with services rendered after that date, and has also terminated paying employer or state contributions to that fund for those services.

E. Severance Clause

In addition to the foregoing provisions, subdivision (d) is added to section 11 of article VII of the Constitution (the "Public Officers and Employees" article). Section 11 of article VII previously had limited the obligations of the Legislators' Retirement System to persons first entering state office after January 1, 1987. Subdivision (d) now sets forth a severance clause reciting that "If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision or application." We discuss the matter of severance below in connection with our discussion of the invalid pension restrictions.

II

DISCUSSION

A. Lifetime Ban or Limit on Consecutive Terms

As a preliminary matter, we must address the interpretive question whether Proposition 140 imposes a "lifetime ban" on officers who have served the specified number of terms, or merely limits the number of *consecutive* terms they may serve. With respect to state legislators, petitioners and intervener assume that once a legislator has served the prescribed maximum number of terms, the measure would forever bar him or her from running for a seat in the legislative house previously served. Respondent Secretary of State, contends, however, that the term limitation "is directed only at the *incumbent office holder*." (Italics in original.) In her view, the measure simply limits the number of consecutive terms served, and she suggests that a former legislator might run for a new term of office if he or she is not currently holding that office.

We focus first on the language of the new measure. The introduction to Proposition 140 refers to curtailing "[t]he ability of legislators to serve unlimited . . . terms," by limiting "the number of terms which may be served." (Cal. Const., art. IV, § 1.5.) Thus, the limitation on the term of state senators adds the language, "No Senator may serve more than 2 terms," to the existing language of the Constitution that "The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years." (Cal. Const., art. IV, § 2, subd. (a).) The limitation on Assembly members is similarly phrased, stating that "No member of the Assembly may serve more than 3 terms." (*Ibid.*) As petitioners observe, the foregoing provisions do not expressly refer to the number of *consecutive* terms served. Moreover, the measure repeatedly announces its intent to eliminate "career politicians" (see Cal. Const., art. IV, §§ 1.5, 4.5), language which would support the view that a lifetime ban was intended.

Respondent Secretary of State points out, however, that these limitations are directed to a "Senator" or "member of the Assembly," rather than a "person," and she argues that a literal

interpretation of the measure thus discloses an intent to limit the right of an *incumbent* legislator to continue unabated terms in office. In respondent Eu's view, once the incumbent legislator has left office, he or she can no longer be described as a "Senator" or "member of the Assembly" to which the term limitation provision would apply.

Petitioners argue that even a purely literal reading of Proposition 140 would support their interpretation: A person who, having already served two prior terms as Senator, surrenders his or her seat for one term and thereafter enters on a third Senate term, could be accurately described as a "Senator" who is "serv[ing] more than 2 terms" contrary to the language of Proposition 140. Intervener suggests that respondent Eu's interpretation, with its emphasis on limiting only *incumbents*, could lead to absurd results, permitting a legislator to avoid the term limitations by resigning shortly before his or her final term had expired, and thereupon announcing an intent to run for reelection unencumbered by any term limitations applicable to "incumbents."

Nonetheless, we agree with respondent Eu that the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban. As we have previously recognized, to help resolve such ambiguities "it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. [Citation.]" (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250.) Such indicia include the analysis and arguments contained in the official ballot pamphlet. (See *ibid.*; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [hereafter *Amador*].) These materials strongly support the position of petitioners and intervener that a lifetime ban from office was contemplated by the framers of, and voters for, Proposition 140.

First, the analysis by the Legislative Analyst described the term limitations as limiting "the number of terms that an elected state official can serve in the *same office*. . . ." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with argument to voters, Gen. Elec. (Nov. 6, 1990) p. 69, italics in original [hereafter Ballot Pamphlet].) No suggestion is made that only a consecutive term limitation was contemplated.

Second, and more significantly, the opponents' ballot arguments against Proposition 140 forcefully and repeatedly stressed the measure's "lifetime ban," and criticized the proponents' failure to disclose that particular aspect of the measure in their arguments to the voters. Indeed, *the primary thrust* of the opponents' ballot arguments was directed to this aspect of the measure. (See Ballot Pamp., *supra*, at pp. 70-71.) The argument against Proposition 140 used the phrases "lifetime ban," "banned for life," or similar terminology *11 times*. (*Ibid.*)

We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their "fears and doubts" are not highly authoritative in construing the measure. (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568, 585.) Nonetheless, we find it significant that the proponents failed to contradict the opponents' "lifetime ban" argument. (See *D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 725.) Moreover, the proponents stressed that Proposition 140 was directed at eliminating "career politicians" or "career legislators," and suggested that "good legislators will always have the opportunity to move *up the ladder*." (Italics added.) These arguments seem to reinforce the idea that a lifetime ban was intended.

We think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served. As we stated in *In re Lance W.* (1985) 37 Cal.3d 873, 889, "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, *the intent of the enacting body is the paramount consideration*." (Italics added.)

Respondent Eu suggests that the applicable principle of interpretation requires us to avoid any constitutional "doubts" or "difficulties" by adopting a construction which will render the measure constitutional. (E.g., *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333-334.) We find no cases suggesting, however, that this interpretive principle precludes resort to extrinsic evi-

dence to resolve possible ambiguities in a measure. Moreover, as we explain in this opinion, the measure's lifetime ban *is* constitutional in all respects.

We conclude that Proposition 140's term limitations extend over the lifetime of each affected office holder.

B. Constitutional Revision or Amendment

Turning to petitioners' constitutional challenges to Proposition 140, they first contend that the measure, and particularly its term and budgetary limitations on the Legislature, effected a constitutional revision rather than a mere amendment. Although "[t]he electors may amend the Constitution by initiative" (Cal. Const., art. XVIII, § 3), a "revision" of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, §§ 2, 4), or by legislative submission of the measure to the voters (*id.*, §§ 1, 4). (See also *Raven v. Deukmejian, supra*, 52 Cal.3d at p. 349.)

Raven suggested that the revision provision is based on the principle that "comprehensive changes" to the Constitution require more formality, discussion and deliberation than is available through the initiative process. (52 Cal.3d at pp. 349-350.) We should bear in mind, however, that the initiative process may represent the only practical means of achieving the kind of "reforms" of the Legislature involved here, because the revision process can be initiated only with the consent of two-thirds membership of each house of the Legislature. (Cal. Const., art. XVIII, §§ 1, 2.)

In *Raven*, citing earlier cases, we observed, "Although the Constitution does not define the terms 'amendment' or 'revision,' the courts have developed some guidelines helpful in resolving the present issue. As explained [in prior cases], our revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision." (52 Cal.3d at p. 350.)

Thus, a constitutional "revision" need not involve widespread deletions, additions and amendments affecting a host of constitu-

tional provisions and resulting in a quantitative revision. "[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also." (*Amador, supra*, 22 Cal.3d at p. 223; see *Raven v. Deukmejian, supra*, 52 Cal.3d at pp. 351-352.)

In *Raven*, we unanimously struck down as an improper revision the provision of Proposition 115 that, in essence, would have vested in the United States Supreme Court all interpretive power as to certain fundamental procedural rights of criminal defendants under the state Constitution. We observed that the challenged provision would have "devastating" effects, by drastically limiting the procedural rights of criminal defendants, by infringing on the power of the state judiciary to protect California citizens from arbitrary or capricious legislation, and by substantially altering the substance and integrity of the state Constitution as a document of independent force and effect. (52 Cal.3d at pp. 352-354.)

Petitioners assert the effects of the term and budgetary limitations of Proposition 140 on the Legislature are similarly dramatic, causing far-reaching changes in our basic governmental plan. As they phrase the argument, "Weakened by budget cuts and harsh term limits, the Legislature will be unable to discharge its traditional duties of policymaker, keeper of the purse, and counterweight to the executive branch in the way the Constitution intends. The result is a change so profound in the structure of our government that it constitutes a revision . . . ."

In petitioners' words, the new term limitations will "virtually guarantee that California will have a new Legislature—that is, a Legislature in which the vast majority of the members are new—every six years." Petitioners note that legislators with "substantial experience" and valuable "expertise" ultimately will be required to surrender forever their legislative offices, and persons with minimal legislative experience will be appointed chairpersons of major committees. Petitioners predict that the Governor's role in the delicately balanced state governmental process will grow as inexperienced legislators become "susceptible to the subtle pressures of the gubernatorial power of appointment."

Additionally, according to petitioners, the power of special interest groups to defeat legislative programs will be enhanced. Those groups opposing legislation proposed by "lame duck legislators" can merely "wait until they leave to dismantle it." Petitioners suggest that inexperienced legislators, lacking any background in "dealing with the budget" or "dealing with each other," will be greatly hindered in their ability to review and pass a satisfactory state budget. They note that several legislators currently serving on key budget committees have done so for periods far in excess of the terms now permitted by Proposition 140.

As for the budgetary limitations imposed by Proposition 140, petitioners observe that the new measure will force a substantial reduction in the funds available for compensating legislators and their staffs, and defraying legislative operating expenses. Approximately $176 million was appropriated for the Legislature for the 1990-1991 fiscal year, but under Proposition 140 only $114 million would be appropriated for the current fiscal year, resulting in a substantial reduction in funds. As the Legislative Analyst explained in the voters' ballot pamphlet, "In 1991-92, expenditures by the Legislature would be reduced by about 38 percent, or $70 million." (Ballot Pamp., *supra*, at p. 69.)

According to petitioners, and undisputed by respondents, in anticipation of the forthcoming budgetary reduction, "as of March 1, 1991, more than 640 employees will have left the Legislature as a result of Proposition 140." For the current fiscal year, "all [Senate] standing committee budgets will be reduced by 20% and all subcommittees and select committees will be eliminated. . . . The Assembly expects to have to take similar steps."

Petitioners note that among those departing from the Legislature are experienced consultants previously hired to provide accurate information concerning proposed or pending legislation. Petitioners predict the Legislature will become "an essentially reactive body," dependent on lobbyists and special interest groups as a source of information, and lacking sufficient funds to develop its own "legislative agenda."

After we granted review in this matter, petitioners sought a stay of the budgetary limitation provisions of Proposition 140, claiming that the offices of Legislative Analyst and Auditor General would be jeopardized unless a stay were granted prior to June 15, 1991, when the proposed budget for the forthcoming fiscal year must be sent to the Governor. (Cal. Const., art. IV, § 12, subd. (c).) Although intervener suggested that petitioners' request amounted to mere "gamesmanship" designed to lend support to their revision challenge, as previously indicated we issued a temporary stay pending our review of the issues.

As previously noted, petitioners contend that the combined effects of the foregoing term and budgetary limitations on California's "basic governmental plan" will be as devastating and far reaching as those involved in the provision of Proposition 115 invalidated by us in *Raven v. Deukmejian, supra*, 52 Cal.3d 336. They thus assert that Proposition 140 has achieved a qualitative revision of the Constitution. We disagree.

First, the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged by Proposition 140. Term and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process, but the process itself should remain essentially as previously contemplated by our Constitution. This aspect distinguishes the present case from *Raven*, in which we struck down a provision that would have fundamentally changed and subordinated the constitutional role assumed by the judiciary in the governmental process. (See also *Amador, supra*, 22 Cal.3d 208, 223 [posing hypothetical example of provision vesting all judicial power in Legislature].)

As indicated in *Raven*, a qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches. (*Raven, supra*, 52 Cal.3d at pp. 352-355.) *Raven* invalidated a portion of Proposition 115 because it deprived the state judiciary of its foundational power to decide cases by independently interpreting provisions of the state Constitution, and delegated that power to the United States Supreme Court. (*Ibid.*)

By contrast, Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched.

Second, although the immediate foreseeable effects of the foregoing term and budgetary limitations are indeed substantial (primarily, the eventual loss of experienced legislators and some support staff), the assertedly momentous consequences to our governmental scheme are largely *speculative* ones, dependent on a number of as yet unproved premises.

Petitioners assume, for example, that the eventual loss of experienced legislators, and the arrival of their relatively unseasoned replacements, will irreparably hinder and damage the legislative process. Yet respondents argue with equal conviction that Proposition 140's term limitations will free the entire process from the control of assertedly entrenched, apathetic, veteran incumbents, thereby allowing fresh creative energies to flourish free of vested, self-serving legislative interests. Respondents also note that the office of Governor is likewise subject to the limitation of two terms under Proposition 140, thus lessening the likelihood that the Legislature will become a subordinate branch.

In similar fashion, whereas petitioners forecast bleak consequences from the budgetary limitations and consequent loss of experienced support staff, respondents assume the monetary restraints will contribute in a positive manner toward eliminating excessive legislative spending and terminating surplus or inefficient personnel.

Petitioners view these budgetary limitations as akin to infringements on the Legislature's inherent "power of self-preservation" as an independent branch of government. (See *Millholen v. Riley* (1930) 211 Cal. 29, 33-34; see also *Brown v. Superior Court* (1982) 33 Cal.3d 242, 248, fn. 5.) In petitioners' words, "a 38% reduction in funds for the Legislature threatens the functioning of

that branch and alters the structure of government." Respondents, on the other hand, assert that the remaining budget allocation (nearly $1 million per legislator for the current fiscal year) is more than ample to provide an effective and efficient legislative staff.

Intervener declares that the Legislature's budget has increased 838 percent during the period from 1968 to 1990, while the Governor's budget increased only 417 percent during this same period. Thus, even after the 38 percent budget cut attributable to Proposition 140, the Legislature's budget will have increased at a substantially greater rate than the Governor's budget over the last 22 years.

We are in no position to resolve the controversy between the parties regarding the long-term consequences of Proposition 140, for the future effects of that measure on our "basic governmental plan" are simply unfathomable at this time. Indeed, that very uncertainty inhibits us from holding that a constitutional revision has occurred in this case. Our prior decisions have made it clear that to find such a revision, it must *necessarily or inevitably appear from the face* of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261 [rejecting argument that Prop. 8 (see Cal. Const., art. I, § 28) involved improper constitutional revision]; *id.*, at pp. 258-259 [rejecting argument that Prop. 8 would improperly cause impairment of essential governmental functions]; *Amador, supra*, 22 Cal.3d at pp. 224-226 [nothing on face of Prop. 13 (see Cal. Const., art. XIII A) "necessarily and inevitably" would result in loss of home rule]; see *Raven v. Deukmejian, supra*, 52 Cal.3d at p. 349 ["nothing on the face of the challenged measure's [Prop. 115] 'necessarily or inevitably' compels" dire economic consequences predicted by petitioners in context of single-subject rule challenge].)

In *Amador*, we considered and rejected a similar revision challenge based on the predicted dire economic consequences to home rule in California arising from the property tax limitations of Proposition 13. We recognized the potential "limiting effect" on local government that would result from the substantial reduc-

tion in tax revenues contemplated by the measure, but we concluded that such economic consequences were insufficient to accomplish a constitutional revision. (22 Cal.3d at p. 225.)

Similarly, in *Brosnahan v. Brown, supra,* 32 Cal.3d at page 261, we observed that "petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural, based primarily upon essentially unpredictable fiscal or budgetary constraints." In the present case, petitioners' prediction that Proposition 140 will "profoundly alter the Legislature's ability to perform its constitutional functions," seems similarly conjectural and speculative. The same objection disposes of petitioners' suggestion, raised only in a footnote, that Proposition 140 may threaten to "impair essential governmental functions" (see *Brosnahan v. Brown, supra,* 32 Cal.3d at pp. 258-260), or to "radically undercut[ ] representative democracy" (see *Amador, supra,* 22 Cal.3d at pp. 227-228).

Petitioners assert that, from an historical standpoint, changes similar in nature to Proposition 140 have been achieved only through formal constitutional revisions. They note that in 1878, as a result of convening a constitutional convention, provisions were adopted that "reduced the Legislature from a full-time body to one that met only biennially and then was only allowed to be paid for sixty days. . . . That system prevailed until 1966, when the Constitution was revised a second time and the Legislature once again became a full-time body." According to petitioners, any such changes "could only have been done as part of a revision."

Of course, the fact that a particular constitutional change was adopted at a constitutional convention does not necessarily indicate the change was a revision. Mere amendments may also be adopted during the course of such proceedings. But the main difficulty with petitioners' argument in this regard is that its acceptance could, as a practical matter, insulate the Legislature from any severe reform measures directed at that branch and initiated by the people, because proceedings to adopt constitutional revisions must be initiated by a two-thirds vote of both houses *of the Legislature*. (Cal. Const., art. XVIII, §§ 1, 2.) To hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only

with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch. Such a result seems inconsistent with the fundamental provision of our Constitution placing "[a]ll political power" in the people. (*Id.*, art. II, § 1.) As that latter provision also states, "Government is instituted for [the people's] protection, security, and benefit, *and they have the right to alter or reform it* when the public good may require." (Italics added.)

It seems indisputable that Proposition 140 represents an attempt by the people to "alter or reform" their own government. To construe article XVIII as vesting the Legislature with a power to veto such reform measures would be seriously inconsistent with the democratic principles expressed in article II. If, as petitioners predict, Proposition 140 ultimately produces grave, undesirable consequences to our governmental plan, the Legislature (Cal. Const., art. XVIII, § 1) or the people (*id.*, art. XVIII, § 3) are empowered to propose a new constitutional amendment to correct the situation. Resolving, as we must, all doubts in favor of the initiative process, we conclude that nothing on the face of Proposition 140 effects a constitutional revision.

C. The Single-subject Requirement

Petitioners next contend that Proposition 140 violates the single-subject provision (Cal. Const., art. II, § 8, subd. (d)), by combining in a single measure such "disparate" subjects as term and budgetary limitations and pension restrictions. We disagree.

The principles that guide our resolution of the issue are well settled: "'[A]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are "reasonably germane"* to each other,' and to the general purpose or object of the initiative. [Citations.]" (*Brosnahan v. Brown, supra,* 32 Cal.3d at p. 245; see also *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 346, and cases cited.)

In the two foregoing cases, we upheld separate crime reform initiatives (Propositions 8 and 115) against single-subject challenges, even though each initiative contained widely disparate procedural and substantive provisions. We observed that the various elements of each of these initiatives united to form a

comprehensive criminal justice reform package with one single unifying theme: promoting the rights of actual and potential crime victims. (See *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 347; *Brosnahan v. Brown, supra,* 32 Cal.3d at p. 247.)

In *Brosnahan,* we admonished that the single-subject rule "obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.' " (32 Cal.3d at p. 253.) We continued by referring to our "liberal interpretative tradition . . . of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." (*Ibid.*)

The unifying theme or common purpose of Proposition 140 is incumbency reform, a subject not excessively general when compared with prior measures upheld by this court. (See also *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 43 [reasonably germane subject of "political practices"]; *Amador, supra,* 22 Cal.3d at p. 231 [valid subject of "property tax relief"]; cf. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1097, 1100 [invalid subjects of "fiscal affairs" and "statutory adjustments"].)

The present measure's introductory statement declares that an "extremely high number of incumbents" are reelected by reason of "The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense. . . ." (Cal. Const., art. IV, § 1.5.) The declared purpose of Proposition 140 is "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office," by limiting "the powers of incumbency." (*Ibid.*)

Petitioners observe that Proposition 140 is broader than mere reform of the legislative branch, because the measure imposes term limitations on various constitutional officers as well as legislators. Moreover, petitioners dispute the idea that reducing or limiting legislators' pension rights could effectively assist in achieving incumbency reform. In their view, reducing state contributions to the Legislators' Retirement System would not elimi-

nate any true advantage incumbents possess over challengers. Petitioners suggest the topic of pension reductions falls into the separate category or subject of "reducing expenditures."

Petitioners appear to be confusing germaneness with functional relationship. As we have previously held, the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship. (See *Brosnahan v. Brown, supra,* 32 Cal.3d at pp. 248-249.) It is enough that the various provisions are reasonably related to a common theme or purpose. (*Id.*, at pp. 246-248; see *Raven v. Deukmejian, supra,* 52 Cal.3d at pp. 347-348.)

The framers of Proposition 140 evidently believed that "the powers of incumbency" could be reduced or checked by making an extended career in public office both less available and less attractive to incumbent legislators, through term and budgetary limitations as well as reduced pension benefits. Budgetary reductions may have been deemed necessary to reduce the advantages incumbents possess vis-a-vis other candidates, as discussed in part D, *post.* As for limited pension benefits, the measure expressly states that the limitation was appropriate because service in the Legislature is no longer "intended as a career occupation." (Cal. Const., art. IV, § 4.5.) The framers presumably did not believe budgetary or pension limitations were needed with respect to the other constitutional officers subject to the term limitations of the measure.

Whether or not these various provisions are wise or sensible, and will combine *effectively* to achieve their stated purpose, is not our concern in evaluating the present single-subject challenge. (See *Amador, supra,* 22 Cal.3d at p. 219 ["We do not consider or weigh the economic or social wisdom or general propriety of the [property tax] initiative. Rather, our sole function is to evaluate [the measure] legally in the light of established constitutional standards."]; see also *CalFarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d at pp. 841-842 [single-subject rule does not require determination whether each section effectively will further the measure's overall purpose]; *In re Lance W., supra,* 37 Cal.3d at p. 887 [wisdom of Prop. 8 irrelevant to constitutional challenge]; *Brosnahan v. Brown, supra,* 32 Cal.3d at p. 248 [same].) Sensi-

ble or not, the separate aspects of Proposition 140 relate to the furtherance of a common purpose.

We conclude that the various provisions of Proposition 140 are reasonably germane to the single subject of incumbency reform.

D. Effect on Voting and Candidacy Rights

Petitioners next assert that the term limitations of Proposition 140 violate the First and Fourteenth Amendments of the federal Constitution. They observe that under Proposition 140, as previously discussed, once the prescribed maximum terms have expired, office holders are forever barred from running for the office they held. According to petitioners, this lifetime ban substantially burdens two fundamental rights, namely, the right to vote and the right to be a candidate for public office. Petitioners, urging "strict scrutiny" of the new measure, suggest that no "compelling state interest" supports such a lifetime ban. (See *Eu v. San Francisco Democratic Com.* (1989) 489 U.S. 214, 222 [hereafter *Eu*]; *Johnson v. Hamilton* (1975) 15 Cal.3d 461, 466-468 [applying strict scrutiny to review constitutionality of candidates' durational residence requirement].)

Respondents, on the other hand, assert the measure is valid under the balancing test announced in *Anderson v. Celebrezze* (1983) 460 U.S. 780, discussed below. Respondents, noting certain mitigating aspects of the measure, contend that the public policy served by Proposition 140 is both rational and compelling, having only minimal effects on voting or candidacy rights. We first turn to the question of the proper standard for resolving petitioners' challenge.

Because Proposition 140 amends the California Constitution itself, it is appropriate that we look to the decisions of the United States Supreme Court for guidance in determining the validity of the measure under the federal Constitution. We have observed that "[i]n analyzing constitutional challenges to election laws, this court has followed closely the analysis of the United States Supreme Court. [Citations.] [¶] The high court has generally addressed the validity of election regulations under the equal protection clause. However, the basis for the court's selection of that approach and the precise nature of the equal protection tests

employed has not always been easily discernible. And, as is true for equal protection doctrine in general, the standard of review utilized in voting and election cases has been in a state of flux. [Citations.]" (*Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 710-711; see also *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 200-201 [dis. opn. of Marshall, J., observing majority's failure to articulate appropriate level of scrutiny for appraising validity of restrictions on ballot access].)

Petitioners assume that a "compelling interest" standard is required by *Eu, supra,* in which the justices unanimously invalidated California's prohibition on primary endorsements by political parties. To the contrary, it seems clear the high court in *Eu* imposed such a strict standard because of the serious impact on First Amendment freedoms of speech and association, interests not as directly impacted by Proposition 140, which does not affect speech interests and which impacts all political parties on an equal basis. (See 489 U.S. at pp. 222-225.) As *Eu* concluded, "Because the ban [on endorsements] burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest." (Id. at p. 225, fn. omitted.) Thus, *Eu* is probably inapposite. (See also *Clements v. Fashing* (1982) 457 U.S. 957, 963 [plurality opinion stating barriers to candidate's access to ballot do not compel close scrutiny]; *Erum v. Cayetano* (9th Cir. 1989) 881 F.2d 689, 692, fn. 7 [discussing *Eu,* but concluding that in cases involving restrictions on ballot access "heightened scrutiny is not the rule"].) In any event, as will appear, it is unlikely we would reach a different result applying strict scrutiny to evaluate Proposition 140.

In *Rivera-Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1, the court considered the constitutional validity of Puerto Rico's system of allowing only certain designated political parties access to the vote needed to fill legislative vacancies on an interim basis. In another unanimous opinion, the court noted that the federal Constitution does not specify the procedure a state must use in filling legislative vacancies (*id.*, at p. 8), that the Constitution does not compel a fixed method of choosing state or local officers or representatives (*id.*, at p. 9), that the right to vote for

state offices is not a constitutionally protected right (*ibid.*), but that once a state or commonwealth provides for elected representatives, a citizen has a constitutional right to participate on an equal basis with other citizens (*id.*, at p. 10).

Rivera-Rodriguez v. Popular Democratic Party, supra, 457 U.S. 1, indicates the high court will give wide latitude to state election laws, even those that may restrict the electorate's choice of representatives, so long as those laws are applied in an even-handed manner without discriminating against particular citizens or classes of citizens. The incumbency limitations involved here satisfy that standard. (See also *Burdick v. Takushi* (9th Cir. 1991) 927 F.2d 469, 473-474 [voters have no constitutional right to vote for particular candidate]; *Stiles v. Blunt* (8th Cir. 1990) 912 F.2d 260, 266, fn. 10, cert. den. (1991) ____ U.S. ____ [111 S.Ct. 1307] [same]; *Zielasko v. State of Ohio* (6th Cir. 1989) 873 F.2d 957, 961 [same]; but see *Caanan v. Abdelnour, supra*, 40 Cal.3d at p. 713.)

In *Canaan v. Abdelnour, supra*, 40 Cal.3d 703, we struck down a city's blanket prohibition against write-in voting in municipal elections. In so doing, we applied the balancing test set forth in *Anderson v. Celebrezze, supra*, 460 U.S. 780, wherein the court held unduly burdensome an Ohio law requiring independent candidates for the November 1980 Presidential Election to file their statements of candidacy by March of that year. The high court in *Anderson*, acknowledging that a state's regulatory interests in determining the eligibility of candidates "are generally sufficient to justify reasonable, nondiscriminatory restrictions" (*id.*, at p. 788, fn. omitted), announced the following test:

"Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. [Citations.] Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court

must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations.] The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.' [Citation.]" (460 U.S. at pp. 789-790.)

With respect to *Anderson*'s requirement of showing the "necessity" of the particular burden imposed by the state, we must also consider whether there are any less drastic alternatives to a lifetime ban. (See *Anderson v. Celebrezze, supra*, 460 U.S. at p. 806; *Canaan v. Abdelnour, supra*, 40 Cal.3d 703, 719, fn. 13.)

Thus, *Anderson v. Celebrezze, supra*, 460 U.S. 780, requires us to consider three separate elements in ascertaining the constitutionality of state laws restricting access to the ballot: (1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justifications for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiff's rights, rather than some less drastic alternatives. Lacking any more specific guidance from the high court, we now apply *Anderson*'s balancing test to the challenged provisions of Proposition 140.

1. Character and Extent of Injury to Protected Rights

Two important rights are affected by Proposition 140, namely, the incumbent's right to run for public office, and the voters' right to reelect the incumbent to that office. Consequently, the "injury" to those rights resulting from the application of Proposition 140 is also twofold, namely, lifetime exclusion of the incumbent from the office previously held, and a corresponding permanent inability of the voters to return the incumbent to that office.

a. Effect on Candidates

As previously explained, Proposition 140 imposes a lifetime ban on legislators once they have completed the maximum number of terms. Petitioners argue, "In the long run, the term limitations

permanently ban those who are arguably the most qualified candidates—incumbents with the experience and expertise in the legislative process necessary to the most effective representation of their constituencies." According to petitioners, qualified incumbents will be "purged" solely to seat "massive numbers" of inexperienced "newcomers." Petitioners predict that only a few qualified persons will be attracted to short term public office.

Respondents, of course, dispute petitioners' premise that long-term legislators are inevitably better qualified than other candidates, and they believe that term limitations will encourage, rather than inhibit, new qualified candidates seeking short term public service. They characterize the term limitations of Proposition 140 as additional candidacy requirements, akin to age, integrity, training or residency, which have generally been upheld. (See, e.g., *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 721; 25 Am.Jur.2d, Elections, § 175, pp. 870-871, and cases cited; Note, *Developments in the Law: Elections* (1975) 88 Harv.L.Rev. 1111, 1217 et seq.)

Respondents also stress three features of Proposition 140 that assertedly serve to mitigate the severity of its lifetime ban: First, the affected incumbent is not barred from seeking any other public office, including a seat in another legislative house or a statewide constitutional office. A former Senator may seek a seat in the Assembly, and vice versa. Second, the term limitations arise only after the incumbent already has had the opportunity to serve a significant period in office (i.e., eight years for a Senator, and six years for a member of the Assembly). Finally, the term limitations are generally applicable to persons elected or appointed on or after November 6, 1990. Except for some incumbent Senators, past terms served do not count in calculating the limitation. Thus, by the time the term limitations of Proposition 140 come into play, the incumbent will have already served, and indeed may continue to serve, several terms in public office.

b. Effect on Voters

Petitioners also stress the impact on the voters who are prevented from casting their ballots for the particular candidate of their choice. Just as incumbent legislators are permanently barred

from running for another term once they have served the prescribed numbers of terms, the voters are permanently barred from voting for such persons, at least for the legislative office they once held. According to petitioners, the voters thus will be denied the right to vote for those persons who arguably possess the best qualifications.

Additionally, petitioners note that because Proposition 140 was adopted on a statewide basis, "the disability [on candidates and voters] is imposed not by those who have the right to vote for the candidate, but rather by those outside the district." Petitioners thus suggest the resulting impact on or injury to the voters is aggravated or enhanced by reason of the ability of voters residing outside a particular voting district to essentially "veto" particular candidates within that district.

Respondents reply by citing federal court cases (e.g., *Burdick v. Takushi, supra*, 927 F.2d 469, 473-474) stating that voters have no constitutional right to vote for particular candidates. Additionally, respondents observe that the challenged measure does not fall into any of the categories of prior cases in which the right to vote was found impermissibly infringed. No identifiable groups of voters are excluded from voting or otherwise unduly burdened in the exercise of their franchise. Characterizing the term limitations of Proposition 140 as additional candidacy qualifications akin to age or residency, respondents submit that Proposition 140 does not truly impair the franchise, for the voters retain the basic fundamental right to cast their ballots for the *qualified* candidate of their choice.

Moreover, respondents observe that neither voter choice nor candidate eligibility is restricted based on the content of protected expression, political affiliation, or inherently arbitrary factors such as race, religion or sex. The only criterion used is incumbency. Voters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may desire in a public officeholder. Under these circumstances, First Amendment protection of political expression and promotion of the marketplace for ideas continue unabated.

Respondents further note that petitioners have cited no case supporting their theory that a voting restriction on "local" offices would be invalid if imposed by voters on a statewide basis. Indeed, such a rule would seemingly call in question *any* statewide legislation affecting the qualification of candidates for local elections, such as age or residency requirements.

Finally, respondents suggest that because Proposition 140 was an initiative measure adopted by the people at a statewide election, any resulting injury to the exercise of the franchise should be deemed self-inflicted, and thus not constitutionally protected.

c. Summary of Impact on Candidates and Voters

In sum, although Proposition 140 does affect the rights of voters and candidates to a degree, there are several mitigating aspects, including the voters' continued right to vote for any qualified candidates, as well as the candidates' ability to run for other public offices, their entitlement to a significant period of service in office before the term limitations apply, and the "prospective" application of the limitation provision. Additionally, we should bear in mind that it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure. Thus, the *legal* impact of Proposition 140 on the voters remains uncertain.

Having discussed the extent of the "asserted injury to the rights protected" (*Anderson v. Celebrezze, supra,* 460 U.S. at p. 789), we next analyze the "precise interests put forward by the State as justifications for the burden imposed by its rule" (*ibid.*).

2. The Interests of the State

Balanced against the foregoing negative impact on candidates and voters flowing from the challenged measure are the considerable state interests assertedly promoted thereby. In the words of new article IV, section 1.5, of the state Constitution, term limitations are deemed necessary to restore "free, fair, and competitive elections," to "encourage qualified candidates to seek public office," and to eliminate "unfair incumbent advantages"

that have resulted in an "extremely high number of incumbents" and created "a class of career politicians" instead of the "citizen representatives envisioned by the Founding Fathers."

According to respondents, the state's interests in limiting incumbency should support measures considerably stronger than a mere temporary disability from holding office. As respondents argue, the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control.

The legitimacy of the foregoing asserted state interests in limiting incumbency are well recognized in analogous contexts. As stated by the West Virginia Supreme Court of Appeals in rejecting a similar challenge to a state constitutional amendment limiting the right of the Governor to seek a third consecutive term, "Constitutional restrictions circumscribing the ability of incumbents to succeed themselves appear in over twenty state constitutions, and exist in the Twenty-second Amendment to the *Constitution of the United States* with regard to the Presidency. The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure. [Citations and fn. omitted]." (*State ex rel. Maloney v. McCartney* (W.Va. 1976) 223 S.E.2d 607, 611 [hereafter *Maloney*], app. dism. *sub nom. Moore v. McCartney* (1976) 425 U.S. 946; see *Maddox v. Fortson* (Ga. 1970) 172 S.E.2d 595, 598-599, cert. den. 397 U.S. 149; cf. Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency* (1988) 49 Ohio St. L.J. 773 et seq.; Tribe, American Constitutional Law (2d ed. 1988) § 13-18, at p. 1097 ["Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic

republic."]; cf. Annot. (1958) 59 A.L.R.2d 716 [construction and effect of incumbency limitation laws].)

The *Maloney* decision continues by describing at length the substantial reasons for limiting the right of incumbents to succeed themselves. These include "The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls," "fears of an entrenched political machine which could effectively foreclose access to the political process," and the belief that regularly disrupting those "machines" "would stimulate criticism within political parties" and "insure a meaningful, adversary, and competitive election." (223 S.E.2d at p. 611.)

In addition, *Maloney* explains that "it has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. [Citation.] . . . Meretricious policies which sacrifice the well-being of economic, social, racial, or geographic minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine." (223 S.E.2d at pp. 611-612.)

Petitioners observe that *Maloney* involved a limitation on *consecutive* terms of a *Governor*, rather than a lifetime ban on incumbent legislators. They suggest that term limitations on the executive branch are justified by the need to check the substantial concentration of power that the chief executive possesses, a consideration assertedly not applicable to the legislative branch. But we think that many, if not all, of the considerations mentioned in *Maloney* (e.g., eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch.

In connection with petitioners' argument that Proposition 140's lifetime ban is unconstitutional, two other cases are instructive, though factually distinguishable. In *Clements v. Fashing*, *supra*, 457 U.S. 957, cited with apparent approval in *Anderson v. Celebrezze*, *supra*, 460 U.S. at page 789, footnote 9, the high

court upheld the validity of a Texas statute that rendered incumbent justices of the peace ineligible for the Texas Legislature. The disability from office extended only during the term for which the justices were elected or appointed. A plurality of the high court took the position that barriers to a candidate's access to the ballot do not compel close scrutiny (457 U.S. at p. 963), and stressed the "de minimis" nature of the restriction, noting that the act merely imposed a brief "waiting period" on current officeholders, and therefore could be sustained by a mere showing of some "rational predicate" to support it (*id.* at pp. 967-968).

The *Clements v. Fashing* plurality did not affirmatively indicate that a lifetime bar to legislative service necessarily would be invalid. Significantly, unlike Proposition 140, the Texas act apparently was not aimed at limiting the powers of incumbency, but was based on the "rational predicate" that an affected justice will be less inclined to abuse his position or neglect his duties because of the justice's aspirations for higher office. (457 U.S. at p. 968.)

In *De Bottari v. Melendez* (1975) 44 Cal.App.3d 910, the Court of Appeal struck down a local ordinance prohibiting *recalled* council members from running for city council within a year of the recall. Although petitioners believe the case supports their position, closer scrutiny indicates otherwise. Finding the candidacy restriction too severe, the *De Bottari* court observed, "Cases in other jurisdictions upholding limitations on successive terms in office [citations] involve similar restrictions but are not authoritative here since such limitations serve totally *different governmental interests.*" (44 Cal.App.3d at p. 913, fn. 1, italics added.) *DeBottari,* using strict scrutiny, reviewed the interests that assertedly supported a temporary ban on candidacy by *recalled* candidates and found them insufficient to sustain the restriction. The court had no occasion to review the "different" interests served by general limitations on incumbency, as outlined by *Maloney, supra.*

In sum, despite its distinguishing features, we conclude that *Maloney's* (*supra,* 223 S.E.2d 607) analysis is quite pertinent to our determination whether permanent incumbency limitations are supported by legitimate and compelling considerations. We conclude they are so supported.

3. Necessity of Imposing Restrictions

We turn next to the "necessity" of imposing the restrictions of Proposition 140 on the dual rights at issue here (see *Anderson v. Celebrezze, supra,* 460 U.S. at pp. 789-790). Petitioners contend that a lifetime ban on candidacy was unnecessary, and that other less "drastic" alternatives, such as a limitation on consecutive terms, together with additional restrictions on campaign contributions to legislators, decreased fringe and pension benefits, and additional incentives for early retirement, would have been sufficient to promote and accomplish the state interests previously discussed.

As will appear, we conclude that the less drastic alternatives suggested by petitioners would have been inadequate to accomplish the declared purpose of Proposition 140 to eliminate the "class of career politicians" that assertedly had been created by virtue of the "unfair incumbent advantages" referred to in that measure. (Cal. Const., art. IV, § 1.5.)

Respondents stress the substantial advantages incumbent legislators enjoy in this state, advantages that permitted 92 percent of all incumbents to win reelection at this state's November 1990 General Election. Indeed, respondents note that nine of these incumbents ran unopposed.

Respondents seem correct in this regard. Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates. (See *Service Employees v. Fair Political Practices Commission* (E.D.Cal. 1990) 747 F.Supp. 580, 588; *Watson v. Fair Political Practices Com.* (1990) 217 Cal.App.3d 1059, 1074, & fn. 13.) As Proposition 140's introductory statement indicates, the framers of the measure believed these substantial advantages of incumbency were unfair to other candidates and tended to create "a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." (Cal. Const., art. IV, § 1.5.)

Petitioners suggest that a more reasonable alternative existed to the measure's lifetime ban: disqualification of the incumbent for the forthcoming term, thus "forcing the legislator to take one term off, before being eligible to run for the body." Yet, as respondents observe, the framers reasonably could conclude that a lifetime ban was necessary to assure that a former office holder could not reinvoke at least some of the advantages of incumbency to gain reelection after leaving office for a term or more.

Additionally, we believe the framers might well have reasonably concluded that a mere ban on consecutive terms could encourage popular "career politicians" to trade terms with each other, or to attempt to arrange for a "caretaker" candidate, such as a spouse or relative, to hold office for them during the interrupted term. For example, when in 1966 George Wallace became legally ineligible to run for reelection as Governor of Alabama because of state term limitations applicable to that office, his wife Lurleen successfully ran in his place, and served as Governor until her death in 1968. George Wallace was reelected as Governor in 1970 and again in 1974. (See 12 The New Encyclopedia Britannica, Micropaedia (15th ed. 1990) Wallace, George C. at p. 467.)

Realistically, only a lifetime ban could protect against various kinds of continued exploitation of the "advantages of incumbency" captured through past terms in office. The remainder of petitioners' suggested "alternatives" essentially involve narrow changes in the system of providing contributions or compensation for legislators, changes that would afford "career politicians" with independent resources little incentive to voluntarily terminate public service.

4. Conclusion

On balance, we conclude the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them. As *Maloney* observed (223 S.E.2d at p. 612), no decisions of the United States Supreme Court have been found that suggest a limitation on incumbency would be unconstitutional. Although such limitations may restrict the franchise (but see cases indicating voters have no right to vote

for particular candidates, e.g., *Burdick v. Takushi, supra,* 927 F.2d 469, 473-474), if we use a balancing test that weighs "the enlargement of the franchise by guaranteeing competitive primary and general elections" against "incidental disenfranchisement" of some voters, the court "must conclude that restrictive provisions on the succession of incumbents do[ ] not frustrate but rather further[ ] the policy of the Fourteenth Amendment." (*Maloney, supra,* 223 S.E.2d at pp. 612-613.)

It is true, as petitioners observe, that respondents have not offered evidence to support all of the various premises on which Proposition 140 is based. But as the United States Supreme Court pointed out in *Munro v. Socialist Workers Party, supra,* 479 U.S. 189, upholding state restrictions on minority party candidacy, a state need not demonstrate empirically all of the various evils that its regulations seek to combat: "Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." (*Id.,* at pp. 195-196.) We have no reason to doubt that the high court would give similar leeway to state regulations imposed directly by the people through the initiative process.

In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

E. Bill of Attainder

Petitioners next assert that Proposition 140 is, in effect, an unlawful bill of attainder. (See U.S. Const., art. I, § 10 ["No state shall . . . pass any bill of attainder. . . ."].) They contend that

although the legislative term, budgetary, and pension limitations of Proposition 140 are facially applicable to all current and future incumbent legislators, the measure was nonetheless intended to punish or penalize the current group of incumbent legislators, and especially such long-term incumbents as Assemblyman Willie Brown (elected in 1964), and Senator David Roberti (elected in 1971).

A bill of attainder has been defined as a "legislative *punishment*, of any form or severity, of specifically designated persons or groups" (*United States v. Brown* (1965) 381 U.S. 437, 447 [federal law forbidding Communist Party members from serving as union officers], italics added), or a "legislative act[] . . . that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict *punishment* on them without a judicial trial" (*United States v. Lovett* (1946) 328 U.S. 303, 315 [federal legislation terminating compensation for certain federal employees accused of subversive activities], italics added). (See also *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group* (1984) 468 U.S. 841, 851 [bills of attainder involve *punitive* action aimed at identifiable person or group]; *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 474; *Cummings v. Missouri* (1866) 71 U.S. 277, 320 ["disqualification from office may be punishment" amounting to an improper bill of attainder]; *Crain v. City of Mountain Home* (8th Cir. 1979) 611 F.2d 726, 729 [invalidating city ordinances that removed city attorney from office for remainder of term, reduced future salary for the office, and prohibited private practice by such officers]; *Connecticut Judicial Selection Com'n v. Larson* (D.Conn. 1989) 745 F.Supp. 88, 94-96 [upholding act shortening terms of incumbent nonattorney members of judicial selection committee].)

Petitioners point to the following language in the ballot arguments by the measure's proponents: "Proposition 140 will end the reign of the Legislature's powerful officers—the Assembly Speaker (first elected a quarter of a century ago) and the Senate Leader (now in his third decade in the Legislature). . . ." (Ballot Pamp., *supra*, at p. 70.) According to petitioners, the foregoing language (together with more explicit references to Brown and

Roberti in the proponents' campaign literature) makes it clear that Proposition 140 was directed at punishing such long-term legislators as Brown and Roberti, and that accordingly the measure must be deemed an improper bill of attainder under the foregoing cases.

We conclude that petitioners' argument should be rejected. As the high court explained in *Nixon v. Administrator of General Services, supra,* 433 U.S. 425, in determining whether particular legislation constitutes a bill of attainder, courts have applied three different tests. We believe the challenged measure meets none of them.

First, an "historical" test has been used to determine whether the subject legislation imposes a kind of punishment traditionally deemed prohibited by the federal Constitution. (433 U.S. at p. 475.) Second, the courts have used a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, *reasonably can be said to further nonpunitive legislative purposes.* [Citations.]" (*Id.,* at pp. 475-476, italics added and fn. omitted.) Finally, the courts have used a "motivational" test, "inquiring whether the legislative record evinces a congressional intent to punish. [Citations.]" (*Id.,* at p. 478.)

Petitioners appear to concede that the historical test is inapplicable here, and we have found no cases involving term limitations as a form of "punishment." As for the functional test, the measure itself expresses broad, *nonpunitive* purposes, namely, "[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" by limiting "the powers of incumbency." (Cal. Const., art. IV, § 1.5.)

Although petitioners point to the "self-serving" nature of these declarations of intent, we have no reason to dispute the accuracy of their description of the measure's primary intent. As in *Nixon v. Administrator of General Services, supra,* 433 U.S. at page 477, "Evaluated in terms of these [express congressional] *asserted* purposes, the law plainly must be held to be an act of nonpunitive legislative policymaking." (Italics added.)

Petitioners rely primarily on the motivational test, stressing the framers' express intent to dislodge such long-term incumbents as Brown and Roberti. Petitioners cite the ballot pamphlet arguments of the measure's proponents, which describe these legislators in unflattering terms ("legislative dictators" participating in "Sacramento's web of special favors and patronage"), and urge passage of the measure as a means of ending their long incumbency.

But the ballot arguments contain no indication of an intent to *punish* those individuals for any particular past misconduct. Broad reform measures are frequently prompted by particular acts or circumstances involving specific individuals, but in our view such measures would not constitute improper bills of attainder unless an intent *to punish* such individuals clearly appears from their face, or from the circumstances surrounding their passage.

As stated in *Connecticut Judicial Selection Com'n v. Larson, supra,* 745 F.Supp. at page 96, quoting from an earlier case, "'[i]t is clear that general legislation such as this . . . *aimed at the office* . . . rather than the incumbent office holders, has none of the objectionable attributes of a bill of attainder.' [Citation.]" (Italics added.) Proposition 140 applies with equal force to all state legislators, current and future. Although it is unquestionable the proponents sought to limit the terms of incumbent legislators, including such long-term legislators as Brown and Roberti, we find no evidence of an intent to single out and *punish* those individuals for any supposed misconduct on their part. Accordingly, we conclude that Proposition 140 does not constitute a bill of attainder under the federal Constitution.

F. Impairment of Contracts

Finally, petitioners maintain that Proposition 140's limitations on the pension rights of incumbent legislators is unconstitutional as an invalid impairment of contract under the federal Constitution. (U.S. Const., art. I, § 10 ["No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."].)

As previously indicated, new section 4.5 is added to article IV of the state Constitution to provide that although the state will contribute the employer's share to the federal Social Security

program on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," nonetheless "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision further provides that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law . . . , but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security . . . ."

Petitioners assert that, as to incumbent legislators continuing to serve on or after November 6, 1990 (either by reelection to a new term or continuation of a prior term), Proposition 140 constitutes an improper impairment of their "vested" contractual or statutory right to continued participation in the pension program administered by the Legislators' Retirement System (LRS). (See Gov. Code, § 9350 et seq.) In petitioners' view, supported by respondent PERS, incumbent legislators who were members of the LRS immediately prior to November 6, 1990, are entitled to continue to earn pension benefits so long as they remain otherwise qualified to receive such benefits through continued state service. Petitioners (not joined in this respect by PERS) assert similar contract claims on behalf of nonincumbent legislators newly elected on November 6.

1. Incumbent legislators

Petitioners' find ample support for their position in California cases confirming that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. (See *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120, 124 [legislators]; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541 [judges]; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-864 [state Treasurer]; *Miller v. State of California* (1977) 18 Cal.3d 808, 814-817 [public employees]; see also *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 [same]; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [same].)

Petitioners (joined by respondent PERS) argue that when incumbent legislators first assumed office, they were impliedly promised pension benefits substantially equivalent to those offered by the then-existing provisions of the LRS, and that these benefits included both the primary right to *receive* any vested pension benefits upon retirement (see *City of Long Beach v. Allen* (1956) 143 Cal.App.2d 35, 38-39), as well as the collateral right to *earn* future pension benefits through continued service, on terms substantially equivalent to those then offered (see *Carman v. Alvord* (1982) 31 Cal.3d 318, 325). Although Proposition 140 by its terms assures that incumbent legislators' right to receive vested pension benefits will not be lost or diminished, the measure also purports to terminate their collateral right to accrue additional benefits through further contributions and continued service to the state.

According to petitioners, the applicable principle is set forth in *Miller v. State of California, supra*, 18 Cal.3d at page 17: "[U]pon acceptance of public employment plaintiff acquired a vested right to a pension based on the system then in effect. That system allowed him to earn successively higher levels of benefits on his years of service and his highest average salary during three consecutive years." (See also *Olson v. Cory, supra*, 27 Cal.3d at p. 541; *Betts v. Board of Administration, supra*, 21 Cal.3d at p. 863; *Kern v. City of Long Beach, supra*, 9 Cal.2d at pp. 855-856.) Similar increased benefits from continued service were provided legislators under the LRS. (See Gov. Code, § 9350.)

In response to petitioners' assertions, respondent Eu and intervener first contend that incumbent legislators do not have a vested right under the LRS to continue to accrue pension benefits through continued service. In this regard, they suggest that article IV, section 4, of the state Constitution precludes legislators from acquiring any vested right to continue to earn pension benefits. We disagree.

Article IV, section 4 of the State Constitution, provides in pertinent part that "*The Legislature* may, prior to their retirement, limit the retirement benefits payable to members of the Legislature . . . ." (Italics added.) That provision, seemingly empowering the Legislature to exercise some measure of control over

the pension rights of its own members prior to their retirement, may create some uncertainty as to the full amount or extent of a legislator's pension rights during his term of office. But the provision neither states nor implies that these rights are thus deemed inchoate and unprotected from impairment by the initiative process. Significantly, we have never suggested that the mere existence of article IV, section 4, precludes legislators from acquiring pension rights protected by the state or federal contract clauses. (Cf. *Allen v. Board of Administration, supra*, 34 Cal.3d at pp. 119-120.)

Petitioners acknowledge that the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, so long as employees receive "comparable new advantages" in return for any substantial reduction in benefits. (*Olson v. Cory, supra*, 27 Cal.3d at p. 541; *Betts v. Board of Administration, supra*, 21 Cal.3d at p. 864; *Allen v. City of Long Beach, supra*, 45 Cal.2d at p. 131.) As we stated in *Olson*, "Although an employee does not obtain any 'absolute right to fixed or specific benefits . . . there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' [Citation.] Such modifications must be reasonable and any ' "changes in a pension plan which result in disadvantages to employees should be accompanied by comparable new advantages." ' [Citation.]" (27 Cal.3d at p. 541.)

Petitioners correctly observe that the pension provisions of Proposition 140 do not merely modify the LRS pension system; rather they *terminate* that system entirely as to additional benefits accruing for future services. Intervener argues that the "transfer" or "redirection" of pension funds to the federal Social Security system operates as a "comparable new advantage" which justifies the impairment and consequently sustains the measure. Petitioners respond by asserting that every legislator already possessed the right to join the federal Social Security system, that 99 out of 120 legislators were already contributing to that system when Proposition 140 was adopted, and that the anticipated federal benefits will be far less than those provided by the LRS. Neither respondent Eu nor intervener has disputed those allegations.

We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service, despite the potential but unexercised limitations contemplated by article IV, section 4, of the state Constitution. We also conclude that the pension restriction of Proposition 140 must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators.

Respondent Eu and intervener next argue that, assuming an incumbent legislator may acquire such vested rights, a different rule should apply to incumbent legislators who commenced new terms after Proposition 140 became effective. They rely primarily on our decision in *Olson v. Cory, supra*, 27 Cal.3d 532, which had upheld a statute limiting certain cost-of-living increases in judges' salaries after they commenced new terms of office. As *Olson* held, "A judge who completes one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by salary benefits then offered by the state for the different term." (27 Cal.3d at p. 540.) Similarly, it is argued, incumbent legislators commencing new terms on or after November 6, 1990, have impliedly agreed to serve under the conditions mandated by the new measure.

Petitioners and respondent PERS contend, however, that pension rights fall into a different category than salary rights. Although a state officer may have no protectible right to continuation of his former salary from term to term, nonetheless *on commencing to serve the state* the officer thereupon acquires a vested right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office. According to petitioners, that right is not extinguished when one term of office ends and another commences. (See *In re Marriage of Alarcon* (1983) 149 Cal.App.3d 544, 552-553 [hereafter *Alarcon*].) To hold otherwise, petitioners argue, could unduly penalize public officers who serve elective or appointive terms.

We agree with petitioners. It would be anomalous to hold that a legislator's supposedly "vested" right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming

no right to receive actual benefits has yet accrued). Under such a holding, a legislator could entirely lose future pension benefits on the very eve of entitlement thereto.

The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits.

As stated in *Alarcon*, "The state's obligation to pay a specific salary extends to the end of each term of office. There is no promise express or implied the state will continue to pay an existing salary beyond the end of a term. Thus, no contractual rights are impaired if different salary or cost of living differentials are payable during and for a future term. [¶] A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligation. [Citations.]" (149 Cal.App.3d at p. 552.)

Alarcon is factually distinguishable, for in that case the affected officer (a state judge who later accepted a federal judgeship) had already acquired a vested, though deferred, right under state law to a full pension *prior* to the enactment of the challenged restriction on pension benefits for persons accepting federal positions. Under such circumstances, the fact the judge served additional terms as a state judge following the adoption of that restriction could not defeat his previously vested pension rights.

Nonetheless, the principle of *Alarcon* seems controlling here. In the present case, incumbent legislators acquired a vested right to earn increased pension benefits in return for continued service. By analogy to *Alarcon*, their commencement of a new term following adoption of the pension restriction of Proposition 140 would not defeat that vested right.

Alarcon further observed that although vested pension rights could be modified before retirement "to keep a pension system flexible and permit adjustments to accord with changing condi-

tions, such modifications must be reasonable" and may not destroy or impair a vested contractual right to a pension. [Citations.]" (149 Cal.App.3d at p. 553.) As we have previously discussed, the pension provisions of Proposition 140, which abruptly terminate an incumbent legislator's right to earn future pension benefits through continued service, must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators, whether or not they will enter a new term on or after November 6, 1990.

Thus, we hold that, under California law, all incumbent legislators acquired a vested right to earn additional pension benefits through continued service, a right which Proposition 140 clearly impairs.

After granting review in this case, we asked for further briefing on the additional question whether the contract clause of the federal Constitution protects the salary or pension rights of state public officials such as legislators. (See, e.g., *Higginbotham v. Baton Rouge* (1939) 306 U.S. 535, 538-539, rehg. den. 307 U.S. 649 [hereafter *Higginbotham*]; *Dodge v. Board of Education* (1937) 302 U.S. 74, 78-79; *Crenshaw v. United States* (1890) 134 U.S. 99, 105-106; *Butler v. Pennsylvania* (1850) 51 U.S. (10 How.) 402, 416-418.)

In *Higginbotham, supra*, a public officer (commissioner of public parks) was discharged in the middle of his term and sued to recover the balance of his salary for the stated term, asserting a federal contracts clause claim. The high court, in a brief, unanimous opinion (citing earlier cases), denied relief, holding that the contract clause does not protect the tenure assigned to a state's public officers. The court relied on the "familiar principle that 'the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.' [Citations.]" (306 U.S. at p. 538.)

The *Higginbotham* (*supra*, 306 U.S. 535) principle, though stated in terms of "tenure," extends to matters of compensation of public officers. As stated in *Dodge v. Board of Education, supra*,

302 U.S. at pages 78-79, cited with approval in *Higginbotham*, state legislation fixing the compensation of public officers "creates no contract in their favor and the compensation named may be altered at the will of the Legislature." (See also *Crenshaw v. United States, supra*, 134 U.S. at p. 105 [compensation paid to state public officers is not protected by federal contract clause].)

The applicable principle to be gleaned from *Higginbotham, supra*, 306 U.S. 535, appears to be that a state (or its local subdivisions) has the power at any time to create, alter or abolish state or local public offices, and thereby reduce the affected officers' salaries or other compensation, unfettered by federal contract clause restrictions. Respondent Eu and intervener argue that if, under *Higginbotham*, a state can terminate a public officer in the midst of his or her term without providing compensation for the remainder thereof, then it would follow that the state likewise can terminate future contributions toward his or her pension, assuming *state* statutory and constitutional guaranties are satisfied. But as petitioners observe, none of these high court cases involved the special area of vested pension rights, or concerned the rights of persons remaining in office for additional terms.

Although the issue is not entirely free of doubt, we conclude that the foregoing federal cases would not withhold federal contract clause protection from incumbent state legislators who have acquired vested pension rights under state law.

Higginbotham involved the *tenure* of public officials and the consequences arising from prematurely terminating that tenure. The case did not concern the quite distinct matter of the pension rights of public officials or employees. As we explained in *Miller*, although the Legislature may reduce the tenure of a public employee's position, and thereby shorten his state service, public employee pension rights involve constitutionally protected obligations. "Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for a public employer '[and] cannot be destroyed . . . without impairing a contractual obligation. . . .' [Citation.]" (18 Cal.3d at p. 814.)

Decisions of this court have assumed the federal contract clause protects the vested pension rights of public officers. *Olson* and *Betts*, both *supra*, involved public officers (a state court judge and a state constitutional officer, respectively), and those cases concluded, without discussion of the *Higginbotham/Dodge* line of decisions, that the federal contract clause would apply to such persons. (See also *Allen v. Board of Administration, supra*, 34 Cal.3d at p. 119.)

In *Lyon v. Flournoy* (1979) 271 Cal.App.2d 774, appeal dismissed 396 U.S. 274, a case likewise involving the rights of a state public official, the Court of Appeal acknowledged the federal rule limiting federal contract clause protection for discharged state public officers (citing *Dodge v. Board of Education, supra*, 302 U.S. 74), and further observed that the public employee pension decisions of this court (e.g., *Kern v. City of Long Beach, supra*, 29 Cal.2d 848) "plac[ed] earned retirement rights within the shelter of the prohibition against contract impairment, without specific citation of either the federal or state clauses." (271 Cal.App.2d at p. 781.) The *Lyon* court nonetheless concluded, "Certainly the California pension decisions have never rejected the federal clause as a source of protection. *It is now too late to do so. California law places earned pension rights of public officers and employees under the protection of the contract clause regardless of any characterization adopted by the federal courts.*" (*Ibid.*, italics added.)

We agree with *Lyon v. Flournoy, supra*, 271 Cal.App.2d 774, that, in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply "too late" to retreat from the clear implication of those holdings. We conclude that the pension restrictions of Proposition 140 are unconstitutional under the federal contract clause as applied to incumbent legislators because they infringe on the vested pension rights of those persons.

2. Nonincumbent legislators

As for nonincumbent legislators first assuming office after Proposition 140 became effective, it seems clear they acquired no vested or protectible right to a continuation of the pension system

in operation prior to their employment and, accordingly, the measure properly may be applied to them. (See *Allen v. Board of Administration, supra*, 34 Cal.3d at p. 124.) Petitioners offer no argument or authorities suggesting a contrary rule as to such persons.

3. Severability

Although a portion of Proposition 140 is invalid as applied to incumbent legislators, its invalidity does not affect the remaining provisions of the measure, for those provisions can be given effect without regard to the validity or operation of the invalid pension restrictions.

Although the drafters of Proposition 140 included a severance clause (section 11 of the measure), by its terms it pertains only to the subject matter of article VII, section 11, of the state Constitution (regarding the obligations of the LRS) rather than to the entire initiative measure. It is possible the framers intended to apply the severance clause to the entire measure, as the clause referred to "this measure" and was placed at the conclusion of the substantive provisions of Proposition 140. But in any event, it is clear that severance of particular provisions is permissible despite the absence of a formal severance clause. (See, e.g., *People v. Mirmirani* (1981) 30 Cal.3d 375, 387, fn. 9.)

As we stated in *Raven v. Deukmejian, supra*, 52 Cal.3d at pages 355-356, quoting from an earlier case, "'[t]he cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable. [Citations.]'" In *Raven*, we invalidated a portion of Proposition 115 (an initiative pertaining to the rights of criminal defendants), but preserved the remainder, relying on the foregoing criteria for severability. The present measure likewise satisfies each of those criteria.

First, the invalid pension restriction, contained in new section 4.5 of article IV of the state Constitution, can be *grammatically* severed without affecting the operation of the remaining clauses. In order to preserve the section's application to nonincumbent legislators, such severance would involve (1) striking from that section the words "or serving in," so that the section applies only

to "a person elected to ~~or serving in~~ the Legislature on or after November 1, 1990," and (2) construing the resulting language as applicable only to nonincumbent legislators *first* elected to the Legislature on or after that date. (See *Walnut Creek Manor v. Fair Employment and Housing Commission* (1991) 54 Cal.3d 245, ____.)

Second, the invalid restriction is *functionally* severable, as its removal would not effect the function or operation of the remaining provisions. The term and budgetary limitations, together with the restriction on nonincumbent legislators' pension rights, can operate entirely independently of the invalid restriction.

Finally, the invalid portion of the measure is *volitionally* severable, in that the framers and voters undoubtedly would have adopted the remaining provisions had they foreseen the success of petitioners' challenge. The framers included language preserving any "vested" rights which may have accrued, disclosing an intent to accommodate any interests protected by federal contract clause principles. As for the voters, there is no indication they placed undue emphasis on the pension rights provision as it applied to incumbent legislators.

III

CONCLUSION

We conclude that, except for the restriction on pensions of incumbent legislators, Proposition 140 is constitutionally valid. The petition for a peremptory writ of mandate is granted to the extent it seeks to compel respondents to refrain from enforcing section 4 of Proposition 140 as applied to incumbent legislators. In all other respects, the petition for mandate is denied. The temporary stay issued on June 14, 1991, is vacated. The parties should bear their own costs. (See *Raven v. Deukmejian, supra*, 52 Cal.3d at p. 356.)

LUCAS, C.J.

WE CONCUR:

PANELLI, J.

KENNARD, J.

ARABIAN, J.

BAXTER, J.

GEORGE, J.

CONCURRING AND DISSENTING OPINION BY MOSK, J.

I concur in the judgment insofar as it invalidates Proposition 140's purported restrictions on the retirement benefits of incumbent legislators.

Otherwise, I dissent.

In this case, we are presented with a broad challenge to Proposition 140—the promotionally self-styled "Political Reform Act of 1990"—under both the United States and California Constitutions. As will appear, the attack is successful on at least two separate and independent points: the initiative violates the single-subject rule of the state charter and also amounts to an unconstitutional revision of that instrument.

I

Proposition 140 and the Single-subject Rule

Beyond any doubt, Proposition 140 violates the single-subject rule on its face and, as a result, is invalid: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d).)

At the outset, I must observe that "The initiative process is out of control in California. Voters are often unable to comprehend all that an initiative measure proposes to accomplish, and they are often asked to vote on a multitude of issues by casting a single ballot." (Note, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California* (1991) 24 U.C. Davis L.Rev. 879, 929 (hereafter Note).) Much, of course, is at stake. The inference is compelled by a consideration of the staggering costs of initiative campaigns. For example, in 1988 proponents and opponents spent more than $130 million in attempting to persuade the voters of the merits of their respective positions. (*Id.* at p. 889, fn. 55.)

Regrettably, I must also observe that in large part, the blame for this chaos must be laid to the court. "One way" to prevent such a situation "is by limiting measures to a single subject." (Note, *supra*, 24 U.C. Davis L.Rev. at pp. 929-930.) Such a means is available: the single-subject rule—which was designed to simplify and clarify initiatives (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 2, 1948), pt. I, argument in favor of Prop. 10, p. 8)—"is already part of the California Constitution. . . ." (Note, *supra*, 24 U.C. Davis L.Rev. at pp. 929-930.) But it is now notorious—and irresponsible—that "the California Supreme Court is reluctant to enforce it. *In over forty years, the court has never invalidated an initiative measure for violating the single-subject rule.*" (*Id.* at p. 896, italics added.) It is also notorious—and irresponsible—that the court not only "avoid[s] invalidating initiatives under the single-subject rule," but also "avoid[s] altogether a meaningful application of the rule." (*Id.* at p. 899.)

I return to Proposition 140. In my concurring and dissenting opinion in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, I discussed the single-subject rule at length with regard to Proposition 115 and its 31 sections. (52 Cal.3d at pp. 357-364 (conc. & dis. opn. of Mosk, J.).) The substance of that discussion was this: ". . . [T]he single-subject rule requires an initiative measure to constitute a coherent enactment in and of itself. It is not enough for such a measure to be capable of bearing some label of indefinite scope. It follows that the 'reasonably germane' test [which is used to apply the rule] must contain as its ultimate criterion whether an initiative measure is internally interrelated as a whole and parts. A standard that focuses on whether the measure is capable of bearing some label is simply empty." (*Id.* at p. 364 (conc. & dis. opn. of Mosk, J.).)

Examined under the foregoing principles, Proposition 140 does not satisfy the single-subject rule. The rule requires a coherent enactment. The test is whether the initiative is internally interrelated. The measure here fails.

By its very terms, Proposition 140 reveals itself to be incoherent: it lacks the requisite internal interrelationship. The initiative embraces three separate and independent subjects—subjects that

are unquestionably of major significance. The first concerns term limits for 132 elected state officials, excluding—for no discernible reason—only the Insurance Commissioner. The second deals with restrictions on the retirement benefits of legislators only. The third relates to limits on expenditures by the Legislature and no other branch of government.

The Legislative Analyst so understood Proposition 140. Indeed, in the analysis presented to the voters in the Ballot Pamphlet, he expressly declared that "This initiative makes three major changes to the California Constitution." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 6, 1990), analysis of Prop. 140 by Legis. Analyst, p. 69 (hereafter Ballot Pamphlet).)

Proposition 140 must be read to have, as a broad purpose, the transformation of the California Constitution from an instrument that allows—and in the view of the initiative's proponents, actually invites—the election and reelection to the Legislature of "politicians," to one that prohibits such a result and in fact encourages service by "citizens."

Such a reading is compelled by the clear meaning of Proposition 140's plain words. Its provisions seek to bar any professional cadre from entering into, or arising out of, the Legislature.

This reading is confirmed by all the Ballot Pamphlet arguments relating to the initiative. Of course, proponents and opponents expressed conflicting opinions as to the wisdom of such a transformation. But both recognized its reality.

The majority find no single-subject violation. They reason that the initiative deals with a "unifying theme or common purpose" that they call "incumbency reform." (Maj. opn., *ante*, at p. ____ [typed maj. opn. at p. 26].) Such a theme is not "unifying"; such a purpose is not "common." The term "incumbency reform" is nothing more, and nothing less, than a seductive label of indefinite scope—a label that can be applied to any "grab bag" containing any provisions, no matter how numerous or heterogeneous, that relate to some officeholder in some way. It begs reality to hold that an initiative that "makes three major changes to the California Constitution" (Ballot Pamp., *supra*, analysis of Prop. 140 by

Legis. Analyst, p. 69) embraces only one subject. But the majority cavalierly do so.[1]

II

Proposition 140 and the Revision Requirements

Proposition 140 amounts to an unconstitutional revision of the state charter on its face and, as a result, is invalid.

Article XVIII of the California Constitution, which is entitled "Amending and Revising the Constitution," provides for (1) amendment by proposal of the Legislature or initiative by the people and (2) revision by proposal of the Legislature *or* constitutional convention called by the Legislature with the approval of the people. Manifestly, these procedures are exclusive. Thus, an amendment may be effected *only* by legislative proposal or popular initiative. And a revision may be effected only by legislative proposal or constitutional convention. It follows that a popular initiative may amend *but may not revise*. (*Brosnahan v. Brown, supra*, 32 Cal.3d at p. 260; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 221.)

"Amendment" and "revision" are not defined in article XVIII or elsewhere in the California Constitution in express terms. But almost 100 years ago, in *Livermore v. Waite* (1894) 102 Cal. 113, the court suggested their meaning.

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[1] I recognize that the majority opinions in *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 245-253, and *Raven v. Deukmejian, supra*, 52 Cal.3d 336, 346-349, furnish some support for the conclusion of the majority here. But the reasoning of *Brosnahan* in this regard is demonstrably faulty. (*Brosnahan v. Brown, supra*, at p. 299 (dis. opn. of Mosk, J.); *Raven v. Deukmejian, supra*, at pp. 363-364 (conc. & dis. opn. of Mosk, J.).) So too is that of *Raven*. (*Raven v. Deukmejian, supra*, at pp. 364-365 (conc. & dis. opn. of Mosk, J.).) It is never too late, or too early, to correct error. My colleagues, however, fail to take the opportunity presented by this case to overrule *Brosnahan* and *Raven* to the extent that they are implicated here. No justification or excuse appears.

At that time, article XVIII provided "two methods" for effecting changes in the Constitution: revision by constitutional convention and amendment by legislative proposal. (*Livermore v. Waite, supra,* 102 Cal. at p. 117.)

The *Livermore* court declared: "Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States. . . . The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, . . . and the provision in article XVIII that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the . . . article, to afford the means of effecting the same result which . . . has been guarded with so much care and precision. The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Livermore v. Waite, supra*, 102 Cal. at pp. 117-119.)

More than 50 years later, in *McFadden v. Jordan* (1948) 32 Cal.2d 330, the court considered whether the so-called "California Bill of Rights," if approved, would effect an amendment or a revision.

At the threshold, the *McFadden* court set out the principles stated in *Livermore*. It then proceeded to determine their applicability to initiatives. "The initiative power reserved by the people by amendment to the Constitution in 1911 [citation] applies only to the proposing and the adopting or rejecting of 'laws and amendments to the Constitution' and does not purport to extend to a constitutional revision." (*McFadden v. Jordan, supra*, 32

Cal.2d at p. 333.) It went on to explain: "The differentiation" "between *amend* and *revise*" "is not merely between two words; more accurately it is between two procedures and between their respective fields of application. . . . The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision." (*Id.* at p. 347.)

Among other things, observed the *McFadden* court, the "California Bill of Rights" would (1) add what were in actuality 12 articles in 208 sections with over 21,000 words to a document containing 25 articles in 347 sections with about 55,000 words; (2) repeal or substantially alter at least 15 of those 25 articles; (3) treat a minimum of 4 new topics; and (4) substantially curtail the functions of both the legislative and executive branches. (*McFadden v. Jordan, supra*, 32 Cal.2d at pp. 334-345.)

"Applying the long established law to any tenable view of the facts which have been related," the *McFadden* court concluded, "it is overwhelmingly certain that the measure now before us would constitute a revision of the Constitution rather than an amendment or 'such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed.'" (*McFadden v. Jordan, supra*, 32 Cal.2d at pp. 349-350, quoting *Livermore v. Waite, supra*, 102 Cal. at pp. 118 119.)

Next, in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra*, 22 Cal.3d 208, the court addressed the question whether Proposition 13, which added article XIII A to the California Constitution, was amendatory or revisory. It stated: "Taken together our *Livermore* and *McFadden* decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision

thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also." (22 Cal.3d at p. 223.) Applying the foregoing standard, the court determined that Proposition 13 had insufficient qualitative or quantitative effect to constitute a revision.

Then, in *People v. Frierson* (1979) 25 Cal.3d 142, a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory. The measure added section 27 to article I of the California Constitution, validating the death penalty as a permissible punishment under that instrument. The plurality concluded that the initiative effected an amendment only: "In *Amador Valley*, we observed that 'even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . .' Section 27, however, accomplishes no such sweeping result." (25 Cal.3d at pp. 186-187 (plur. opn.), citation omitted [dictum].)

Next, in *Brosnahan v. Brown, supra*, 32 Cal.3d 236, the court addressed whether Proposition 8, as a whole, was amendatory or revisory. Applying the "dual analysis" of *Amador Valley*, which "examin[es] both the quantitative and qualitative effects of" an initiative "upon our constitutional scheme," the court concluded that the measure "did not accomplish a 'revision' . . . ." (32 Cal.3d at pp. 260-261.)

Finally, in *In re Lance W.* (1985) 37 Cal.3d 873, the court considered whether section 3 of Proposition 8, which added article I, section 28, subdivision (d), to the California Constitution, was revisory. It had first determined that section 3 of the initiative abrogated the judicially created exclusionary rule as a remedy for the violation of a criminal defendant's state constitutional right against unreasonable searches and seizures. It reasoned that the people's exercise of the legislative power to restrict judicial authority in this area "does not, either qualitatively or quantitatively, 'accomplish such far reaching changes in the nature of [judicial authority] as to amount to a revision' of the Constitution" because such power is constitutionally recognized and its use in this matter does not amount to "a sweeping change either

in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch . . . ." (37 Cal.3d at pp. 891-892.)

In light of the case law, the definitional standard applicable for purposes of article XVIII of the California Constitution is as follows. A "revision" denotes a change that is qualitatively or quantitatively extensive, affecting the "underlying principles upon which [the Constitution] rests" or the "substantial entirety of the instrument." (*Livermore v. Waite, supra*, 102 Cal. at p. 118.) By contrast, an "amendment" denotes a change that is qualitatively and quantitatively limited, making a modification "within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (Id. at pp. 118-119.)[2]

I now turn to the question whether Proposition 140 amounts to an unconstitutional revision.

As explained above, the initiative has as a broad purpose the transformation of the California Constitution from an instrument that allows, and perhaps actually invites, the election and reelec-

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[2] It could perhaps be argued that the definitional standard may require modification. In *Livermore*, the court reasoned in substance that "revision" denoted qualitatively or quantitatively extensive change because the process of revision as then defined, i.e., by constitutional convention, was exceptionally difficult. In *McFadden*, the court adhered to that reasoning because its predicate still obtained. In *Amador Valley*, the court recognized that a change had been wrought: formerly, "a constitutional revision could be accomplished *only* by the elaborate procedure of the convening of, and action by, a constitutional convention" (22 Cal.3d at p. 222, italics in original); now, it can also be effected by the relatively simple procedure of legislative proposal (*id.* at p. 221). The court implied the change was "significant." (*Id.* at p. 222.) But it apparently failed to appreciate precisely what its "significance" was. Because the process of revision as now defined is slightly, if at all, more difficult than the process of amendment, "revision" might perhaps be deemed to denote a change that is slightly, if at all, more extensive than that accomplished by "amendment." In a word, if an "amendment" is a modification "within the lines of the original instrument," a "revision" is any change beyond those lines in any degree.

tion to the Legislature of "politicians," to one that prohibits such a result and in fact encourages service by "citizens."

I observe at the outset that the wisdom of Proposition 140 is of no consequence to the analysis. To be sure, the initiative may be judged foolish and impractical. But it may also be viewed otherwise. Certainly, the exercise of governmental authority by "citizens" as opposed to "politicians," including the wielding of legislative power, has long been an ideal within the Western political tradition, and sometimes even a reality. (See Maio, *Politeia and Adjudication in Fourth-Century B.C. Athens* (1983) 28 Am. J. Juris. 16, 17-23.) Again, however, the desirability of the measure is immaterial.

The basic governmental plan of California is established, of course, by the California Constitution. The powers are the legislative, executive, and judicial. (Cal. Const., art. III, § 3.) The branches that are vested with those powers are, respectively, the Legislature (*id.*, art. IV, § 1), the Governor (*id.*, art. V, § 1), and the judiciary (*id.*, art. VI, § 1).

The nature of the three powers and the function of the three branches have been settled since virtually the inception of our polity.

In *Nougues v. Douglass* (1857) 7 Cal. 65, the court stated: "The three great departments are essentially different in their constitution, nature, and powers, and in the means provided for each by the Constitution, to enable each to perform its appropriate functions. These three departments are all equally necessary to the very existence of the government. [¶] The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution. It is primarily [*sic*] and original, antecedent and fundamental, and must be exercised before the other departments can have anything to do. Its exercise is a condition *precedent*, and the exercise of the executive and judicial functions are conditions *subsequent*. The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them." (*Id.* at pp. 69-70, italics in original.)

Manifestly, Proposition 140 amounts to an unconstitutional revision because of its significant effect on the Legislature.

As the discussion above reveals, the Legislature is a fundamental component of the state constitutional system. It is one of the "three great departments" and is "necessary to the very existence of the government." (*Nougues v. Douglass, supra*, 7 Cal. at pp. 69-70.) Indeed, its power is the "creative element" in the scheme. (*Id.* at p. 70.)

Moreover, the Legislature must be deemed fundamentally altered by any substantial change in its nature or character.

Finally, the change that would be effected by Proposition 140 would be substantial. In the state's history, only two such changes have clearly been of this sort: the movement from a full-time Legislature with broad powers to a part-time body subject to narrow limitations, which was effected when the present Constitution superseded the original instrument in 1879; and a movement in the opposite direction, which was accomplished under the successful proposal of the California Constitutional Revision Commission in 1966. The change here would be of similar magnitude: "citizens" would be put in the Legislature in the place of "politicians."

In *Raven v. Deukmejian, supra*, 52 Cal.3d 336, we held that section 3 of Proposition 115 amounted to an unconstitutional revision because of its significant effect on the judiciary. The provision in question, designed to amend article I, section 24, of the California Constitution, would have restricted the power of state courts to interpret certain state constitutional rights of criminal defendants. Like the Legislature, the judiciary is one of the "three great departments" and is "necessary to the very existence of the government." (*Nougues v. Douglass, supra*, 7 Cal. at pp. 69-70.) Also like the Legislature, it must be deemed fundamentally altered by any substantial change in its nature or character. The change threatened by section 3 of Proposition 115 would have been such.

It follows a fortiori that an initiative that would put laypersons into the judiciary in the place of jurists would amount to an unconstitutional revision because of its significant effect on that

branch. Clearly, such a provision would go far beyond section 3 of Proposition 115 in fundamentally altering the courts by effecting a substantial change in their nature and character.

If an initiative like the foregoing would be an unconstitutional revision, so too Proposition 140. The one would improperly affect the judiciary, the other the Legislature.

In sum, Proposition 140 would fundamentally alter a fundamental component of the state constitutional system by effecting a substantial change in the nature and character of the Legislature. Such an alteration, of course, would be qualitatively extensive, affecting the "underlying principles upon which [the Constitution] rests." (*Livermore v. Waite*, *supra*, 102 Cal. at p. 118.) Therefore, it would be revisory.

The majority conclude to the contrary. They reason that Proposition 140's possible future consequences for the Legislature are not dispositive. I agree. They also reason that the initiative does not affect the Legislature's constitutional structure or powers. Again, I agree. But as explained above, a judiciary comprising laypersons is fundamentally different from one made up of jurists —even if its structure and powers are the same. Similarly, a Legislature of "citizens" is fundamentally different from one of "politicians." It is a "citizen" Legislature that is the measure's object and also its necessary and inevitable effect.

The majority's claim that "the initiative process may represent the only *practical* means of achieving the kind of 'reforms' of the Legislature involved here" (maj. opn., *ante*, at p. ____ [typed maj. opn. at p. 14], italics added) is simply immaterial. The initiative process is not a *proper* means of achieving "reforms" that are revisory. True, "our Constitution places '[a]ll political power' in the people" and recognizes their " '. . . right to alter or reform [government] when the public good may require.' " (*Id.* at p. ____ [typed maj. opn. at p. 24], italics deleted.) But it also restricts the wielding of that power and the exercise of that right through various provisions—among which, of course, are the requirements governing revision.

III

Conclusion

For all the reasons stated above, I would invalidate Proposition 140 in its entirety as violative of the single-subject rule and as unconstitutionally revisory.[3]

MOSK, J.

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[3] Because of the result I reach, I need not proceed further. I note in passing that Proposition 140 is also arguably invalid as a bill of attainder proscribed by article I, section 10, clause 1, of the United States Constitution. Bills of attainder, within the meaning of the federal charter, are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." (*United States v. Lovett* (1946) 328 U.S. 303, 315.) In substance and effect, the measure here is such: it is a popular initiative that imposes the nonjudicial penalty of disqualification on the "easily ascertainable members" of the Legislature who were its primary targets. With apparent reason, the punishment of disqualification is visited on those who are convicted of certain crimes specified in the Constitution and statutes of California. (See Gov. Code, § 1021.) With no reason whatever, the same penalty now awaits those who were Proposition 140's primary targets. With less reason still, it also awaits all others who hold or will hold the offices specified in the initiative.

Appendix B

[Text from pp. 68-71, 137-138 of California Ballot Pamphlet, General Election, November 6, 1990]

140 Limits on Terms of Office, Legislators' Retirement, Legislative Operating Costs. Initiative Constitutional Amendment

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Official Title and Summary:

LIMITS ON TERMS OF OFFICE, LEGISLATORS' RETIREMENT, LEGISLATIVE OPERATING COSTS. INITIATIVE CONSTITUTIONAL AMENDMENT

- Persons elected or appointed after November 5, 1990, holding offices of Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Board of Equalization members, and State Senators, limited to two terms; members of the Assembly limited to three terms.

- Requires legislators elected or serving after November 1, 1990, to participate in federal Social Security program; precludes accrual of other pension and retirement benefits resulting from legislative service, except vested rights.

- Limits expenditures of Legislature for compensation and operating costs and equipment, to specified amount.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- The limitation on terms will have no fiscal effect.

- The restrictions on the legislative retirement benefits would reduce state costs by approximately $750,000 a year.

- To the extent that future legislators do not participate in the federal Social Security system, there would be unknown future savings to the state.

- Legislative expenditures in 1991-92 would be reduced by about 38 percent, or $70 million.
- In subsequent years, the measure would limit growth in these expenditures to the changes in the state's appropriations limit.

Analysis by the Legislative Analyst

Background

There are 132 elected state officials in California. This includes 120 legislators and 12 other state officials, including the Governor, Lieutenant Governor, and Attorney General. Currently, there is no limit on the number of terms that these officials can serve. Proposition 112, passed by the voters in June 1990, requires the annual salaries and benefits (excluding retirement) of these state officials to be set by a commission. Most of these officials participate in the federal Social Security system, and all have the option of participating in the Legislators' Retirement System. The vast majority of the 132 elected state officials participate in this retirement system. The system is supported by contributions from participating officials and the state.

Funding for the Legislature and its employees is included in the annual state budget. Before it becomes law, the budget must be approved by a two-thirds vote of the membership of both houses of the Legislature and must be signed by the Governor.

Proposal

This initiative makes three major changes to the California Constitution. First, it limits the number of terms that an elected state official can serve in the *same office* (the new office of Insurance Commissioner is not affected by this measure). Second, it prohibits legislators from earning state retirement benefits from their future service in the Legislature. Third, it limits the total amount of expenditures by the Legislature for salaries and operating expenses.

The specific provisions of this measure are:

Limits on the Terms of Elected State Officials

- The following state elected officials would be limited to no more than two four-year terms in the same office: Governor, Lieutenant Governor, Attorney General, Controller, Secretary of State, Superintendent of Public Instruction, Treasurer, members of the Board of Equalization, and State Senators.
- Members of the State Assembly would be limited to no more than three two-year terms in the same office.
- These limits apply to a state official who is elected on or after November 6, 1990. However, State Senators whose offices are *not* on the November 1990 ballot may serve only one additional term.

Restrictions on Legislative Retirement Benefits

- This measure prohibits current and future legislators from earning state retirement benefits from their service in the Legislature on or after November 7, 1990. This restriction would not eliminate retirement benefits earned prior to that time.
- This measure requires a legislator serving in the Legislature on or after November 7, 1990 to participate in the federal Social Security system. (However, federal law may permit only current legislators who are presently participating in the federal Social Security system to continue to participate in the system. It may also prohibit future legislators from participating in the federal Society [sic] Security system.)
- This measure does not change the Social Security coverage or the state retirement benefits of other state elected officials such as the Governor, Lieutenant Governor, and Attorney General.

Limits on Expenditures by the Legislature

- This measure limits the total amount of expenditures by the Legislature for salaries and operating expenses, beginning in the 1991-92 fiscal year.

- In 1991-92, these expenditures are limited to the *lower* of two amounts: (1) a total of $950,000 per Member or (2) 80 percent of the total amount of money expended in the previous year for these purposes. In future years, the measure limits expenditure growth to an amount equal to the percentage change in the state's appropriations limit.

Fiscal Effect

Limits on the Terms of Elected State Officials. This provision would not have any fiscal effect.

Restrictions on Legislative Retirement Benefits. The provision which prohibits current and future Members of the Legislature from earning state retirement benefits from legislative service on and after November 7, 1990 would reduce state costs by about $750,000 a year.

To the extent that future legislators do not participate in the federal Social Security system, the measure would result in unknown future savings to the state.

Limits on Expenditures by the Legislature. In 1991-92, expenditures by the Legislature would be reduced by about 38 percent, or $70 million. In subsequent years, this measure would limit growth in these expenditures to the change in the state's appropriations limit.

Argument in Favor of Proposition 140

Proposition 140 will for the first time ever place a limit on the number of terms a State official may service in office.

A Yes Vote on Proposition 140 will reform a political system that has created a legislature of career politicians in California. It is a system that has given a tiny elite (only 120 people out of 30 million) almost limitless power over the lives of California's taxpayers and consumers.

Proposition 140, will limit State Senators to two terms (8 years); will limit Assembly members to three terms (6 years); and limit the Governor and other elected constitutional officers to two terms (8 years).

By reducing the amount they can spend on their personal office expenses, Proposition 140, will cut back on the 3,000 political staffers who serve the legislature in Sacramento. In the first year alone, according to the legislative analyst, it will save taxpayers $60 million.

Proposition 140, will end extravagant pensions for legislators. While most Californians have to depend on Social Security and their own savings, the legislative pension system often pays more than the legislator received while in office. In fact 50 former officials receive $2,000.00 per month or more from the Legislative retirement fund.

Limiting Terms, will create more competitive elections, so good legislators will always have the opportunity to move up the ladder. Term limitation will end the ingrown, political nature of both houses—to the benefit of every man, woman and child in California.

Proposition 140, will remove the grip that vested interests have over the legislature and remove the huge political slush funds at the disposal of Senate and Assembly leaders.

Proposition 140 will put an end to the life-time legislators, who have developed cozy relationships with special interests. We all remember the saying, "Power corrupts and absolute power corrupts absolutely." But limit the terms of Legislative members, remove the Speaker's cronies, and we will also put an end to the Sacramento web of special favors and patronage.

Proposition 140 will end the reign of the Legislature's powerful officers—the Assembly Speaker (first elected a quarter of a century ago) and the Senate Leader (now into his third decade in the Legislature). Lobbyists and power brokers pay homage to these legislative dictators, for they control the fate of bills, parcel out money to the camp followers and hangers-on, and pull strings behind the scenes to decide election outcomes.

Incumbent legislators seldom lose. In the 1988 election, 100% of incumbent state senators and 96% of incumbent members of the assembly were re-elected. The British House of Lords—even the Soviet Legislature—has a higher turnover rate. Enough is Enough! It's time to put an end to a system that makes incum-

bents a special class of citizen and pays them a guaranteed annual wage from first election to the grave. Let's restore that form of government envisioned by our Founding Fathers—a government of citizens representing their fellow citizens.

VOTE YES ON PROPOSITION 140 TO *LIMIT STATE OFFICIALS TERM OF OFFICE!*

PETER F. SCHABARUM
Chairman, Los Angeles County Board of Supervisors

LEWIS K. UHLER
President, National Tax-Limitation Committee

J.G. FORD, JR.
President, Marin United Taxpayers Association

Rebuttal to Argument in Favor of Proposition 140

Proposition 140 is a proposal by a downtown Los Angeles politician to take away your right to choose your legislators. He has a history of taking away voting rights. He and two political cronies voted to spend $500,000.00 in tax dollars to hire a personal lawyer to defend him against Voting Rights Act violations in Federal Court. Newspapers call it an "outrageous back room deal."

His "Big Bucks" friends, including high-priced lobbyists, have lined his pockets with campaign contributions to help control who *you* can vote for.

- IF 140 PASSES, LOBBYISTS COULD SUBSTITUTE THEIR OWN PAID EMPLOYEES FOR THE INDEPENDENT STAFF RESEARCHERS OF THE LEGISLATURE ELIMINATED BY THIS MEASURE.
- 140 MISLEADS YOU ABOUT THE SO-CALLED "HIGH" COST OF THE LEGISLATURE—THE COST IS LESS THAN ½ PENNY PER TAX DOLLAR.
- THE BIGGEST LIE IS THE FACT THEY DON'T TELL YOU THAT 140 IS A *LIFETIME BAN.*

This is a blatant power grab by Los Angeles contributors and lobbyists who have been wining and dining "Mr. Downtown Los Angeles" in government for SEVEN TERMS—OVER TWENTY YEARS.

Practice what you preach, "Mr. Downtown Los Angeles," Peter Schabarum. Cut *your own* budget and limit *your own* terms. Don't be piggy and take away people's rights after you have fully eaten at the table.

There is no need for 140. The vast majority of the Legislature *already* serves less than 10 years.

That's *your* choice.

Keep it.

Stop Downtown Los Angeles' power grab.

Vote no on 140!

ED FOGLIA
President, California Teachers Association

DAN TERRY
President, California Professional Firefighters

LINDA M. TANGREN
State Chair, California National Women's Political Caucus

Argument Against Proposition 140

Proposition 140 claims to mandate term limits. But in fact, it limits our voting rights.

This measure takes away the cherished constitutional right to freely cast a ballot for candidates of our choice.

We are asked to forfeit *our* right to decide who *our* individual representatives will be.

PROPOSITION 140'S LIFETIME BAN

140 does *not* limit *consecutive* terms of office. Instead 140 says:

- After serving six years in the Assembly, individuals will be constitutionally *banned for life* from ever serving in the Assembly.
- After serving eight years in the Senate, individuals will be constitutionally *banned for life* from ever serving in the Senate.
- Similar lifetime bans will be imposed on the Superintendent of Public Instruction and other statewide offices.

There are no exceptions—not for merit, not for statewide emergencies, not for the overwhelming will of the people.

Once banned, always banned.

PROPOSITION 140 IS UNFAIR

It treats everyone—good and bad, competent and incompetent —the same.

No matter how good a job someone does in office, they will be *banned for life*.

No matter what cause they may be fighting for or how badly we, the people, want to reelect them, they will be *banned for life*.

You won't even be able to write-in their names on your ballot. If you do, your vote won't count.

That's just not fair.

LIMITS OUR RIGHT TO CHOOSE

The backers of 140 don't trust us, the people, to choose our elected officials. So instead of promoting thoughtful reforms that help us weed out bad legislators, they impose a lifetime ban that eliminates good legislators and bad ones alike at the expense of our constitutional rights.

No eligible citizen should be *permanently banned* for life from seeking any office in a free society. And we should not be *permanently banned* from voting freely for the candidate of our choice.

Resist the rhetoric. Proposition 140 is not about restricting the powers of incumbency. It's about taking away our powers to choose.

PHONY PENSION REFORM

Proposition 140's retirement provisions also are misdirected and counterproductive.

140 does not eliminate the real abuses: double and triple dipping—the practice of taking multiple pensions.

Instead it raises new barriers to public office by banning our future representatives from earning *any* retirement except their current social security.

140's retirement ban won't hurt rich candidates. It will hurt qualified, ordinary citizens who are not rich and have to work hard to provide economic security for themselves and their families.

PROPOSITION 140 GOES TOO FAR

It upsets our system of constitutional checks and balances, forcing our representatives to become even more dependent on entrenched bureaucrats and shrewd lobbyists.

If its proponents were sincere about political reform, they wouldn't have cluttered it with so many unworkable provisions.

VOTE NO ON PROPOSITION 140

STOP THIS RADICAL AND DANGEROUS SCHEME! PROTECT OUR CONSTITUTIONAL RIGHTS. VOTE NO ON PROPOSITION 140'S LIFETIME BAN.

DR. REGENE L. MITCHELL
President, Consumer Federation of California

LUCY BLAKE
Executive Director, California League of Conservation Voters

DAN TERRY
President, California Professional Firefighters

Rebuttal to Argument Against Proposition 140

Proposition 140 restores *true* democracy, gives you *real* choices of candidates, protects *your* rights to be represented by someone who knows and cares about *your* wishes. It opens up the political system so *everyone*—not just the entrenched career politicians—can participate.

Proposition 140 will bring new ideas, workable policies and fresh cleansing air to Sacramento. All are needed badly. A stench of greed, and vote-selling hangs over Sacramento because life-time-in-office incumbents think its *their* government, not yours.

Californians polled by the state's largest newspaper say "most politicians are for sale," and "taking bribes is a relatively common practice" among lawmakers. Proposition 140 cuts the ties between corrupting special interest money and long-term legislators.

Why don't more people vote? Because incumbents have rigged the system in their favor so much, elections are meaningless. Even the worst of legislators get reelected 98% of the time. Honest, ethical, *truly* representative people who want to run for office don't stand a chance.

Do career legislators *really* earn their guaranteed salaries, extravagant pensions, limousines, air travel and other luxury benefits? No. They use *your* money and *your* government to buy themselves power and guaranteed reelections.

Who really opposes Proposition 140? It isn't ordinary people who have to work for a living. It's incumbent legislators and their camp followers. Beware of movie stars and celebrities in million-dollar TV ads, attacking proposition 140. They're doing the dirty work for career politicians.

VOTE "YES!" ON PROPOSITION 140. ENOUGH, IS ENOUGH!

W. BRUCE LEE, II
Executive Director, California Business League

LEE A. PHELPS
Chairman, Alliance of California Taxpayers

ART PAGDAN, M.D.
National 1st V.P., Filipino-American Political Association

Proposition 140: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by amending and adding sections thereof: therefore, new provisions proposed to be inserted or added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This measure shall be known and may be cited as "The Political Reform Act of 1990."

SEC. 2. Section 1.5 is added to Article IV of the California Constitution, to read:

SEC. 1.5. The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.

The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These

unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

SEC. 3. Section 2 of Article IV of the California Constitution is amended to read:

SEC. 2. (a) The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years. *No Senator may serve more than 2 terms.*

The Assembly has a membership of 80 members elected for 2-year terms. *No member of the Assembly may serve more than 3 terms.*

Their terms shall commence on the first Monday in December next following their election.

(b) Election of members of the Assembly shall be on the first Tuesday after the first Monday in November of even-numbered years unless otherwise prescribed by the Legislature. Senators shall be elected at the same time and places as members of the Assembly.

(c) A person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year, and a citizen of the United States and a resident of California for 3 years, immediately preceding the election.

(d) When a vacancy occurs in the Legislature the Governor immediately shall call an election to fill the vacancy.

SEC. 4. Section 4.5 is added to Article IV of the California Constitution, to read:

SEC. 4.5. Notwithstanding any other provision of this Constitution or existing law, a person elected to or serving in the Legislature on or after November 1, 1990, shall participate in the Federal Social Security (Retirement, Disability, Health Insurance) Program and the State shall pay only the employer's share of the contribution necessary to such participation. No other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation. This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law to a person holding or having held office in the Legislature, but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than Social Security to the extent herein provided.

SEC. 5. Section 7.5 is added to Article IV of the California Constitution, to read:

SEC. 7.5. In the fiscal year immediately following the adoption of this Act, the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature may not exceed an amount equal to nine hundred fifty thousand dollars ($950,000) per member for that fiscal year or 80 percent of the amount of money expended for those purposes in the preceding fiscal year, whichever is less. For each fiscal year thereafter, the total aggregate expenditures may not exceed an amount equal to that expended for those purposes in the preceding fiscal year, adjusted and compounded by an amount equal to the percentage increase in the appropriations limit for the state established pursuant to Article XIII B.

SEC. 6. Section 2 of Article V of the California Constitution is amended to read:

SEC. 2. The Governor shall be elected every fourth year at the same time and places as members of the Assembly and hold office from the Monday after January 1 following the election

until a successor qualifies. The Governor shall be an elector who has been a citizen of the United States and a resident of this State for 5 years immediately preceding the Governor's election. The Governor may not hold other public office. *No Governor may serve more than 2 terms.*

SEC. 7. Section 11 of Article V of the California Constitution is amended to read:

SEC. 11. The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor. *No Lieutenant Governor, Attorney General, Controller, Secretary of State, or Treasurer may serve in the same office for more than 2 terms.*

SEC. 8. Section 2 of Article IX of the California Constitution is amended to read:

SEC. 2. A Superintendent of Public Instruction shall be elected by the qualified electors of the State at each gubernatorial election. The Superintendent of Public Instruction shall enter upon the duties of the office on the first Monday after the first day of January next succeeding each gubernatorial election. *No Superintendent of Public Instruction may serve more than 2 terms.*

SEC. 9. Section 17 of the Article XIII of the California Constitution is amended to read:

SEC. 17. The Board of Equalization consists of 5 voting members: the Controller and 4 members elected for 4-year terms at gubernatorial elections. The state shall be divided into four Board of Equalization districts with the voters of each district electing one member. *No member may serve more than 2 terms.*

SEC. 10. Section 7 is added to Article XX of the California Constitution, to read:

SEC. 7. The limitations on the number of terms prescribed by Section 2 of Article IV, Sections 2 and 11 of Article V, Section 2 of Article IX, and Section 17 of Article XIII apply only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the

ballot for the general election on that date may serve only one additional term. Those limitations shall not apply to any unexpired term to which a person is elected or appointed if the remainder of the term is less than half of the full term.

SEC. 11. Section 11(d) is added to Article VII of the California Constitution, to read:

SEC. 11. (a) The Legislators' Retirement System shall not pay any unmodified retirement allowance or its actuarial equivalent to any person who on or after January 1, 1987, entered for the first time any state office for which membership in the Legislator's Retirement System was elective or to any beneficiary or survivor of such a person, which exceeds the higher of (1) the salary receivable by the person currently serving in the office in which the retired person served or (2) the highest salary that was received by the retired person while serving in that office.

(b) The Judge's Retirement System shall not pay any unmodified retirement allowance or its actuarial equivalent to any person who on or after January 1, 1987, entered for the first time any judicial office subject to the Judges' Retirement System or to any beneficiary or survivor of such a person, which exceeds the higher of (1) the salary receivable by the person currently serving in the judicial office in which the retired person served or (2) the highest salary that was received by the retired person while serving in that judicial office.

(c) The Legislature may define the terms used in this section.

(d) If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision or application.

Appendix C

[Exhibit 1 to Declaration of Michael Galizio, filed as Attachment A to Reply Brief in Support of Petition for Writ of Mandate and/or Prohibition on May 1, 1991]

TERM LIMITS!

YES on 140

Paid for by CCLT

Appendix D

[Exhibit C to Declaration of Lowell Finley, filed with Appendix to Memorandum of Points and Authorities In Support of Petition for Writ of Mandate and/or Prohibition on February 21, 1991]

California Committee to Limit Terms
3385 Arden Way • Sacramento CA 95825 • (916) 482-6175

Dear Friend and Supporter,

Wow! Is Willie Brown ever ANGRY at *YOU!*

That's right, YOU!

Why? Because he has just heard the astonishing news—our TERM LIMITS Initiative has qualified for the November ballot.

However, the fight has just begun!

Just as Willie Brown and his cohorts spent millions of dollars to defeat Proposition 119, the fair reapportionment proposition, they will raise *millions* to defeat our TERM LIMITS amendment.

Despite their campaign warchest, *I have a plan* that will get our TERM LIMITS amendment passed.

In a moment I will share with you the details of my plan. But first let me tell you why Willie Brown is so angry.

TERM LIMITS is the one thing Willie Brown and the liberal majority fear most.

AND rightly so.

If TERM LIMITS passes into law it will *forever change* California politics.

No longer will the fat cats in Sacramento be able to build their own empires on the backs of good, honest taxpayers.

Contributions or gifts to Special Project of People's Advocate, Inc. are not deductible as charitable contributions for federal income tax purposes.

No longer will corrupt, liberal legislators be able to live within their self-imposed castles of power year in and year out, without ever having to face the laws they enact.

When TERM LIMITS passes Assemblymen will only be able to serve six years, and State Senators and other statewide elected officials will be limited to two terms—and then they will all have to go home.

Just think! When this proposition passes we will truly be able to replace liberal politicians, especially those who have made a career out of sitting in the seats of power:

- Willie Brown, elected in 1964—26 years in the Assembly
- David Roberti, elected in 1971—19 years in the Senate
- John Vasconcellos, elected in 1966—24 years in the Assembly

Not only are California politicians running scared, so are elected officials in the other 49 states.

If TERM LIMITS passes—and it will only pass with your support—it will be just like Proposition 13. Californians passed Proposition 13 and the rest of the nation followed suit.

Next, we will limit the terms of federal officials, such as:

- Alan Cranston, elected 1968—22 years in the Senate
- Ted Kennedy, elected 1962—28 years in the Senate
- Barney Frank, elected 1980—10 years in the House

Not only will TERM LIMITS clean house, it will help keep the house clean in the future.

Can you imagine another 26 years of Willie Brown? Another 22 years of Alan Cranston?

You can see now why you and I must fight for passage of this historic amendment to our State constitution.

Instead, this proposition will give new candidates a chance of getting elected—good, moral, upright candidates.

That's reason enough to support this Amendment.

But TERM LIMITS means *limits*, in more ways than one.

It also will limit the legislature's operating budget AND *eliminate* special pensions for politicians.

Instead of coasting on a fat pension in their retirement years (a retirement that *we pay* for), TERM LIMITS will make the politicians participate in Social Security, just like the rest of us.

The tax-and-spend liberals love to tax-and-spend . . . *other* people's money, not their own money. They wouldn't dream of paying into Social Security.

But now they will have to pay their own fair share.

Now you can see why virtually all our incumbent politicians hate TERM LIMITS.

Even as you read this letter the politicians are already planning their multi-million dollar cammpaign to defeat TERM LIMITS.

Jack Lemmon and James Garner have probably already started filming false and deceptive ads.

If they spent millions to defeat fair districts, you *know* they will do the same to try and defeat TERM LIMITS.

But even though we are outmanned and outgunned, we *can* defeat them. The opinion polls show that 70% of the people APPROVE of TERM LIMITS.

The only thing we have to do is to *organize* and *direct* this groundswell of support—and the *victory will be ours*.

Here is my plan:

To fight them, we must have TV commercials. And to make them we desperately need your financial support. And I don't have to tell you how expensive it is to produce commercials.

That is why the "California Committee to Limit Terms" (CCLT) needs $131,000 in the next 22 days.

But what good will $131,000 do against the *millions* Willie Brown can, and will, spend?

I'll tell you.

Incredible as it may sound, many TV and radio stations have told us that they will donate FREE "Equal Time" commercials.

That's right! The stations will give us *one free commercial for every three* the opposition buys. The only thing that we have to do is to provide the commercials.

So by spending $131,000 we can not only pay for our phone banks, mailings and grassroots campaign, but receive as much as $2 million worth of free TV commercials as a bonus!

You can now see how important your gifts to CCLT are—they really *do* make a difference. And that is why I need you to send me the contribution amount I have listed on your enclosed Media Campaign Budget Authorization card.

If each of our CCLT members can send this requested amount, we will have what we need to produce these radio and television commercials and *get them on the air.*

Often the committed few are asked to contribute more often than others, but it is *only people like you* who I can turn to for support, knowing that you will not let me down.

With your help we can preserve our system of free elections! With your *support* we *can* get TERM LIMITS passed into law. Let me hear from you today!

Sincerely,

TED COSTA
Ted Costa, President
California Committee to Limit Terms
A special project of
PEOPLE'S ADVOCATE

P.S. Just think, when TERM LIMITS passes, it will be "so long Willie Brown." Join with me in giving Willie Brown the "Boot." Return your Media Campaign Budget Authorization card along with your most generous gift, today.

(2)

No. 91-1113

FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

v.

MARCH FONG EU, et al.,

Respondents.

Petition For Writ Of Certiorari To The California Supreme Court

OPPOSITION TO PETITION FOR CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California

ROBERT L. MUKAI
Chief Assistant Attorney General

FLOYD D. SHIMOMURA
Assistant Attorney General (Acting)

DANIEL G. STONE
MANUEL M. MEDEIROS*
Deputy Attorneys General

P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 323-1996

Attorneys for Respondent March Fong Eu

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the provisions of article IV, section 2, of the California Constitution, limiting the number of terms that may be served by members of the California Assembly and Senate, represent a proper and lawful exercise of the sovereign power of the people of California to ensure that the membership of each of the constituent houses of their legislature is refreshed by regular turn over.

2. Whether Proposition 140, adopted by the voters of California on November 6, 1990, is a bill of attainder prohibited by article I, section 10, clause 1, of the United States Constitution.

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RELEVANT FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

In addition to those federal and state constitutional provisions identified as relevant by petitioner, respondent would add the following:

United States Constitution, amendment IX:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

United States Constitution, amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

California Constitution, article IV, section 1.5:

> The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at State expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy,

rather than of the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed on the number of terms which may be served.

STATEMENT OF THE CASE

Proposition 140, "The Political Reform Act of 1990" (hereafter, the Act), was adopted by election of the people of the State of California as an amendment to their Constitution on November 6, 1990, pursuant to their reserved power of initiative. Cal. Const., art. XVIII, § 3. The Act added to and amended the state Constitution for the express purpose of restoring a free and democratic system of fair elections by bringing about a return to the ideal of the "citizen representative." Cal. Const., art. IV, § 1.5. Through the Act, the people sought to achieve this goal by, *inter alia*, reimposing a ceiling on the Legislature's budget;[1] restricting retirement benefits based on legislative service;[2] and limiting the number of terms which persons may serve in constitutional offices.[3]

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[1] Cal. Const., art. IV, § 7.5

[2] Cal. Const., art. IV, § 4.5

[3] Cal. Const., art. IV, § 2 [legislators]; art. V, § 2 [Governor]; art. V, § 11 [Lieutenant Governor, Attorney General,

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Following adoption of the Act, suit was filed in the California Supreme Court to invalidate the initiative measure.[4] Petitioners therein were the state Legislature and its two constituent houses, individual legislators and voters, and various organizations. None of California's constitutional officers other than legislators joined in the petition. A-1, *post*. In the state proceedings, Petitioners raised both state and federal issues. In their petition to this Court, Petitioners correctly identify the federal issues which they *alleged* in their petition to the state court. Pet. at 5. However, the Court should be aware that Petitioners did not pursue all claims, neither briefing nor arguing the alleged violation of the Guaranty Clause of article IV, section 4, of the Constitution.[5]

On October 10, 1991, the California Supreme Court issued its opinion in the litigation: *Legislature v. Eu*, 54 Cal.3d 492 (1991). Insofar as is relevant to these proceedings, the court rejected Petitioners' contention that the term-limitation provisions of the Act violated rights guaranteed to legislative candidates and to voters by the First and Fourteenth Amendments of the Constitution, and the

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Controller, Secretary of State, Treasurer]; art. IX, § 2 [Superintendent of Public Instruction]; art. XIII, § 17 [members of the state Board of Equalization].

[4] A copy of that pleading is reproduced herein as an Appendix, pages A-1 through A-18.

[5] Petitioners similarly do not discuss the Guaranty Clause in their petition to this Court.

court further held that the Act did not amount to a bill of attainder.[6]

On the issue of First and Fourteenth Amendment rights, the court applied the test articulated by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), finding that compelling public interests supported the people's decision to limit legislative terms of office and that these compelling interests outweighed the impact which the limitation might have on some candidates and voters. *Legislature v. Eu, supra*, 54 Cal.3d at 517-522. The court also found that the limitation on legislative terms was the least restrictive alternative necessary to accomplish the people's desired goal, concluding that "[r]ealistically, only a lifetime ban could protect against various kinds of continued exploitation of the 'advantages of incumbency' captured through past terms in office." *Id.* at 522-524.

The Supreme Court also rejected Petitioners' bill-of-attainder claim. Contrary to Petitioners' suggestion to this Court, however, the state court's decision was not grounded on the fact that it could find no case in which term limitations have been held to be a form of punishment. See Pet. at 6. In actuality, the court stated:

> Proposition 140 applies with equal force to all state legislators, current and future. Although it

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[6] Although not raised as an issue in this proceeding, but see No. 91-1114, the Supreme Court held that, for incumbent legislators continuing to serve on or after November 6, 1990, those provisions of the Act limiting future accrual of retirement credits for legislative service constituted an unconstitutional impairment of contract obligations. *Legislature v. Eu, supra*, 54 Cal.3d at 527-534.

> is unquestionable that proponents sought to limit the terms of incumbent legislators, including such long-term legislators as [Speaker of the Assembly] Brown and [President Pro Tem of the Senate] Roberti, we find no evidence of an intent to single out and *punish* those individuals for any supposed misconduct on their part. Accordingly, we conclude that Proposition 140 does not constitute a bill of attainder under the Federal Constitution.

Legislature v. Eu, supra, 54 Cal.3d at 527 (emphasis in original).

Petitioners below have now petitioned this Court to review the decision of the California Supreme Court insofar as that court held that the Act does not constitute an unlawful bill of attainder, and insofar as the court held that a limitation on legislative terms of office does not impermissibly deprive Petitioners of rights guaranteed them by the First and Fourteenth Amendments of the United States Constitution. Respondent respectfully submits that the dispute does not warrant this Court's attention at this time.

As will be demonstrated, the first election wherein the Act will have any legal effect will not occur until November 1996 and, for some, not until November 1998. Senators newly elected in November 1990 must still face re-election in November 1994; mid-term Senators must face re-election in November 1992; and all Members of the Assembly must face re-election in November 1992 and November 1994 before facing a re-election bar because of the Act.

It cannot reasonably even be argued that there is an immediate threat to First or Fourteenth Amendment rights. If in the future such an immediate threat could credibly be alleged, federal district courts will be available to test the allegation.

Respondent does not deny that the Act presents important issues for ultimate disposition by this Court – at an appropriate time. However, the term-limitation provisions of the California Act are the first such provisions to be litigated in any court, and they do not yet operate to restrict the re-election of any incumbent California legislator.

As Petitioners acknowledge, term limits have become a matter of increasing national interest.[7] Pet. at 7.[8] By deferring consideration of the constitutional challenge raised by Petitioners herein, this Court would likely be aided by the analyses of more state or federal courts offering a variety of analytical methodologies illuminating the issue.[9] Moreover, even if "strict scrutiny" of term

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[7] See e.g., Geo. Will, *Term-Limit Momentum*, The Washington Post, January 2, 1992, Editorial Section, p. A23.

[8] Petitioners suggest that the growing national interest in term limits is analogous to the national interest in loyalty oaths. Respondent submits, however, that the apparent trend toward term limitations is more accurately compared to the trend in the early part of this century where the people of several states, frustrated with their legislatures, reserved to themselves the powers of direct legislation and referendum. See 42 Am.Jur.2d, Initiative & Referendum, § 1, p. 649.

[9] By the time this Court undertook consideration of the constitutional challenge to the power of direct legislation, for

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limitations is the exclusive test required of any court, as Petitioners contend, no injustice flows from denial of the instant petition because it is evident that the California Supreme Court did strictly scrutinize the term limitation provisions of the Act, as will be demonstrated *post*.

Respondent thus urges the Court to deny the petition for the reason that there is presently no immediate threat to the constitutional rights of the petitioning legislator and the petitioning voters. With respect to the state Legislature, the organizational petitioners, and several of the individual petitioners, Respondent will show that the petition should be denied for manifest lack of standing.

REASONS FOR DENYING CERTIORARI

I

CONSIDERATION OF THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION IS NOT PRESENTLY NECESSARY

A. None of the Petitioning Legislators or Voters Faces An Imminent Threat To First or Fourteenth Amendment Rights

The term limitation provisions of the Act operate prospectively only. They apply "only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is

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example, the Court had the benefit of several state court analyses of the issue. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 131 (1912).

not on the ballot for the general election on that date may serve only one additional term." Cal. Const., art. XX, § 7.

California Senators serve four-year terms; half of the California Senate is elected every two years. Cal. Const., art. IV, § 2(a). Incumbent Senators who did not stand election in November 1990 are, accordingly, permitted to serve out the remaining two years of their present term and to run again, in 1992 or, if unsuccessful in 1992, then in any election thereafter, for another four-year term. Thus, if they are successful in 1992, these individuals will not be confronted with the term limitation bar of the Act until 1996. Assuming that Senators in this category are faced with the bar in 1996, i.e., that they were re-elected to office in 1992, these Senators would still not be precluded from running for other public office. They could run for Assembly, for example; they could run for any statewide elective office in the Executive Branch of state government; they could run for local office; or they could run for Congress.

Persons elected or re-elected to the Senate in November 1990 may serve the entirety of their four-year term, and they are free to run for an additional *four-year* term in 1994 or, if unsuccessful in that election, at another election thereafter. Senators in this category, then, assuming they are re-elected in 1994, would serve until *1998* before the Act would bar further service in the Senate. And, of course, these persons, too, would thereafter be free to run for any elective office other than Senate.

All members of the California Assembly are elected every two years. Cal. Const., art. IV, § 2(a). Persons elected to the Assembly in November 1990 may serve

their present two-year term, run for re-election in November 1992 and, if re-elected, serve a second two-year term of office, run for re-election in November 1994 and, if re-elected, serve a third two-year term of office. Should any member decline to run in one or more of these elections, he or she would be free to run for re-election in November 1996 or thereafter. Only members who serve three, consecutive, two-year terms between November 1990 and November 1996 would be barred from holding office in the Assembly thereafter. Here again, however, no such individual would be precluded from holding office in the Senate, in the Executive Branch of government, or in any city or county government, or in Congress.

Of course, in the proceedings below, each of the petitioner legislators who claims an infringement on his or her right to hold office alleged an intention to run for the same office in 1996 or 1998, as the case may be, and swore this to be so in declarations under penalty of perjury. However, for purposes of legal analysis, such declarations can hardly be given much weight. "The process of prediction in the political arena is fraught with difficulties, to which many unsuccessful candidates can most eloquently testify." *Honneywood v. Rockefeller*, 214 F.Supp. 897, 902 (E.D.NY 1963).

Indeed, legislative districts were recently reconfigured by the California Supreme Court in *Wilson v. Eu*, ___ Cal.3d ___, 1992 Cal LEXIS 6 (Jan. 27, 1992; No. S022835), wherein the court adopted, with minor exceptions, the redistricting plan proposed by appointed special masters. As a result, constituencies before whom any of the petitioning legislators would have to run in 1996 or

1998 are, in many cases, quite different from those by whom they were elected in November 1990. Moreover, in some cases, more than one incumbent presently finds himself or herself residing in the same legislative district configured by the special masters. Indeed, such is the case for Senator Roberti, one of the petitioners herein. Rather than compete against a fellow Democratic incumbent for the same Senate seat, Senator Roberti has reportedly chosen to run for election in an entirely new Senate seat recently vacated by an incumbent in connection with a guilty plea on federal corruption charges.[10] In this election, Senator Roberti will be seeking the support of an entirely new constituency.

Similarly, Assemblymember Roybal-Allard, one of the Petitioners herein, despite her alleged and sworn intention to run for Assembly in 1996, was reported to be considering a run for a new congressional seat resulting from the redistricting.[11] She is also reportedly considering the alternative of running for election in a newly created Senate seat.[12] Petitioner Castillo's interest in the litigation below was her alleged desire to vote for Assemblymember Roybal-Allard for Assembly. A-7, ¶ 26, *post*. That interest disappears, of course, should Ms. Roybal-Allard choose not to run for Assembly at all in 1992.

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[10] See Ingram, *Sen. Roberti Leaning Toward Running In Robbins' District*, The Los Angeles Times, January 29, 1992, Metro Section, Part B, p. 8, col. 2.

[11] Muir, *Reapportionment Shuffles the Political Deck*, The Los Angeles Times, January 3, 1992, Metro Section, Part B, p. 1., col. 2.

[12] *Ibid.*

In short, it is simply not credible for any of the petitioning legislators to allege that their asserted right to run for Senate, as an example, will be infringed *in 1996 or 1998*. Even without the changes worked by redistricting, any one of these legislators might choose to run for another office, or might choose not to run for Senate at all.[13] The same, of course, is true of the petitioning members of the Assembly.

Likewise, especially in light of changes worked by redistricting, it is simply not credible that voters can prospectively claim an infringement on the right to vote for an identified incumbent *five or seven years hence*. Moreover, the "right" of any of these petitioner voters to vote for a particular candidate is necessarily dependent upon the choice of that candidate to run for office – a contingency which the individual voter cannot easily control. Petitioner Steele, for example, submitted a declaration below wherein he swore his intention to vote for Senator Milton Marks in 1992 and 1996. Appx. to Mem. Points & Auth. in Support of Pet., Tab. No. 27. But there was no evidence whatsoever presented that Senator Marks intends to or will run again for Senate in 1992 or 1996. Similarly, in the proceedings below, petitioner Wallace

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[13] Petitioner Cecil Green, for example, has announced his intention, for reasons apparently related to health, not to seek reelection to the Senate. *State Sen. Green Announces He Will Not Run For Reelection*, The Los Angeles Times, February 1, 1992, Part A, p. 21, col. 1. In addition, Petitioner Ed Davis, has announced his intention not to seek reelection. Cheevers and Gladstone, *Ed Davis Calls It Quits: "I Have Served Long Enough,"* The Los Angeles Times, January 29, 1992, Metro Section, Part B, p. 1, col. 2.

alleged a violation of his right to vote for Assemblymember Hannigan and Senator Keene in 1996 and 1998. A-9, ¶ 31, *post*. However, neither Hannigan nor Keene was a petitioner below, and there was no evidence that either individual intends to run again for the office he presently holds.

Until such time as it becomes clear that one or more of petitioning legislators is actually prevented from being a candidate for an office by virtue of the term-limitation provisions of the California Constitution, protestations of future intent to run are necessarily pure speculation – insufficiently concrete to make out a case or controversy cognizable under article III. *Renee v. Geary*, 111 S.Ct. 2331, 2339-2340 (1991).[14]

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[14] A number of coincidences may figure in a candidate's ultimate decision to run for a particular legislative seat. At the time he joined this action, for example, petitioner Roberti was the incumbent Senator for the 23rd Senate District. See A-3, ¶ 4, *post*. However, as a result of redistricting by the California Supreme Court, Senator Roberti has decided to run in the special election to fill the vacancy in the 20th Senate District. See Ingram, note 10, *supra*. That seat was vacated in 1991 by its incumbent, Senator Robbins, in connection with a guilty plea to federal criminal charges. If successful in the special election, Senator Roberti will serve out the remaining two years of Senator Robbins' four-year term.

This situation could present issues requiring further construction of the California Constitution by the state courts. Under the Act, the term limitations "apply only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only *one additional term*." Cal. Const., art. XX, § 7 (emphasis

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As this Court has observed: " 'It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.' " *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2400 (1991), quoting *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900). Proper recognition of the reserved rights of California and its people, U.S.Const., amend. IX, amend. X, requires that federal courts refrain from intruding in this unique area of sovereignty unless and until it is clearly necessary to do so.

At a minimum, therefore, federal courts, including this Court, should await proof that a petitioning incumbent has, in fact, been denied an opportunity to appear on the ballot, *solely* by virtue of the California Constitution's term limitations. In such a case, a clear and concrete denial of access to the ballot would at least be apparent, and the petitioner could credibly allege a genuine, *prima facie* constitutional claim.

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added). As an incumbent Senator whose office was not on the ballot for the November 1990 election, Senator Roberti is permitted to run again for one additional term in the November 1992 election. Under normal circumstances, he would be expected to run again for his 23rd Senate District seat which, if successful, he could hold until *November 1996*. It may be argued that if, instead of running for reelection in his present 23rd Senate District, Senator Roberti successfully runs for election in the vacant 20th Senate District, he will have been elected to the "one additional term" permitted under the Constitution – albeit for only the remaining two years of a term.

Respondent respectfully submits that it is not presently necessary for this Court to entertain Petitioners' dispute, as none of the Petitioners is presently threatened with deprivation of any constitutional rights. When, *and if*, such a controversy can actually be shown to exist, Petitioners will have access to the federal courts for assistance.

B. Whether Or Not Required To Do So, The California Supreme Court Effectively Applied A Strict Scrutiny Analysis To The Act's Term Limitation Provisions. Therefore, Denial of the Petition Would Not Suggest This Court's Implicit Approval Of A Less Stringent Test

Article IV, § 2(a), imposes no qualification for *entering* upon the office of Senator or Member of the Assembly in the first instance; it only limits the duration in which one who *is* elected to one or the other office may serve therein. Thus, any citizen who satisfies minimal residency requirements is eligible to be elected to the office of Senator. Cal. Const., art. IV, § 2(c). But one may *serve* in the office of Senator for only four years before standing for reelection, and for only eight years *in toto*. Cal. Const., art. IV, § 2(a). Likewise, one may *serve* as a Member of the Assembly for only two years before standing for reelection, and for only six years *in toto*. (*Ibid.*)

Because a durational limit on the holding of an office perforce disqualifies *from further service* persons who have already held the office for the maximum period allowed, the court below analyzed the limitation as a "ballot access" case, looking for guidance to this Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Petitioners,

however, contended that the analysis should be governed by this Court's decision in *Eu v. San Francisco County Democratic Committee*, 489 U.S. 214 (1989), a case concerning state prohibition of political speech and state regulation of the internal affairs of political parties.

The Supreme Court found that the *Eu* opinion was not controlling as respects the test to be applied in analyzing the term-limitation provisions of Proposition 140. The court reasoned that, "[this Court] in *Eu* imposed such a strict standard because of the serious impact on First Amendment freedoms of speech and association, interests not as directly impacted by Proposition 140, which does not affect speech interests and which impacts all political parties on an equal basis." *Legislature v. Eu*, 54 Cal.3d at 515. Instead, the court followed the test articulated by this Court in *Anderson*. Although the court did not read *Anderson* absolutely to impose a "strict scrutiny" standard, the court observed that, "[i]n any event . . . it is unlikely we would reach a different result applying strict scrutiny to evaluate Proposition 140." *Legislature v. Eu*, 54 Cal.3d at 515.

Indeed, whether or not the court chose to characterize its application of *Anderson* as a "strict scrutiny" test, it is clear that the court did, in fact, strictly scrutinize the term-limitation provisions of the Proposition. The court set forth at length the state's interests in term limitations, *Legislature v. Eu*, 54 Cal.3d at 520-522, concluding that the limitations were "supported by legitimate and compelling considerations." *Id.* at 522. Moreover, contrary to Petitioners' assertion, the court did not "ignore[] the discussion of least drastic alternatives at the close of the *Anderson* majority opinion." Pet. at 9. To the contrary, the

court expressly noted that, "[w]ith respect to *Anderson's* requirement of showing the 'necessity' of the particular burden imposed by the state, we must also consider whether there are any less drastic alternatives to a lifetime ban." *Legislature v. Eu*, 54 Cal.3d at 517. The court expressly found that no such alternatives existed to accomplish the people's intended purpose. *Id.* at 522-525.

Respondent disputes Petitioners' contention that treatment of this case is governed by decisions analyzing state laws restricting political speech or regulating the internal affairs of political parties. Respondent believes that this case is instead governed by the reasoning in *Sugarman v. Dougall*, 413 U.S. 634 (1973), and in this Court's recent decision, *Gregory v. Ashcroft, supra*, 111 S.Ct. 2395. The term limitation provisions of article IV, § 2(a), of the California Constitution possess "the unique nature of [a] state decision[] that 'go[es] to the heart of representative government.' " *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2401, quoting *Sugarman, supra*, 413 U.S. at 647. These provisions reflect the considered judgment of the people of California acting in their reserved sovereign capacity to amend their constitution. Cal. Const., art. II, §§ 1, 8; art. IV, § 1; art. XVIII, § 3.[15] " '[This Court] will not

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[15] Petitioners acknowledge that the Proposition received 52% of the votes cast. They seek to minimize that support, however, by stating that "[t]hose who voted for it constituted only 19% of those eligible to vote in California." Pet. 4. This is just another way of saying that there was only a 37% voter turnout in the election. Regrettable as the low turnout may be, it is more than sufficient under law. Indeed, such a vote pattern, on a national level, would be sufficient to elect the President of the United States.

overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational.' " *Gregory v. Ashcroft, supra,* 111 S.Ct. at 2406, quoting from *Vance v. Bradley,* 440 U.S. 93, 97 (1979). Here, it is beyond reasonable dispute that the people's choice to disqualify two-time Senate incumbents and three-time Assembly incumbents from further service in the legislature is related to the achievement of legitimate sovereign purposes.

But, even if Petitioners were correct that the test to be applied was the strict scrutiny test employed in *Eu v. San Francisco County Democratic Committee,* this Court's review of the state court's decision would nevertheless be unnecessary. As is evident from the decision, and as noted above, the California court *did* strictly scrutinize the term limitation provisions – at some length. It matters not, then, whether the court below *characterized* its "balancing test" as a "strict scrutiny" test; Petitioners, in any event, *received* the strict judicial scrutiny of the Act that they demanded.

Inasmuch as the state court effectively applied a "strict scrutiny" test to the facts, there is no need for this Court to revisit that application *de novo.* Cf., *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 1690 (1990), and concurring opinions of Stevens and Kennedy, JJ.. And there is, accordingly, little danger that a denial of certiorari by this Court would be construed to reflect implicit approval of a less stringent standard.

II

THE PLEA OF INDIVIDUALS AND ENTITIES OTHER THAN INDIVIDUAL LEGISLATORS AND VOTERS ADDS NOTHING TO THE PETITION; THESE REMAINING PETITIONERS LACK STANDING TO INVOKE THIS COURT'S JURISDICTION

As is the case with every federal court, this Court's jurisdiction is limited to "cases" or "controversies" within the meaning of article III of the Constitution. See e.g., *Secretary of State of MD. v. J.H. Munson Co.*, 467 U.S. 947, 954 n.4 (1984); *United States v. Raines*, 362 U.S. 17, 21 (1960). The question of standing, "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

Respondent assumes that all of the parties named as petitioners in the proceedings below purport now to invoke the jurisdiction of this Court. See Sup. Ct. R. 12.4.[16] It is, of course, for state courts to determine the

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[16] The text of the petition identifies one Melissa Eddy as a petitioner in this Court. Pet. at 11. However, Melissa Eddy was not a party in the proceedings below. See Pet. at ii n. 1; A-1, A-2 through A-9, *post*. The basis of her asserted capacity as a purported petitioner before this Court is, therefore, unknown. The petition alleges that Proposition 140 "bars Petitioner Melissa Eddy and the thousands of other citizens who voted for Senator Davis in 1988 from the opportunity to vote for him for Senate in 1996 *or ever again*." Pet. at 11 (emphasis in original). However, Senator Davis has announced his intention to retire from legislative service rather than run for reelection. Cheevers and Gladstone, *Ed Davis Calls It Quits: "I Have Served Long Enough,"* The Los Angeles Times, January 29, 1992, Metro Section, Part B, p. 1, col. 2.

standing of litigants to raise constitutional issues in those courts. See *Williams v. Mayor*, 289 U.S. 36, 41 (1933). However, because standing for purposes of article III is a federal question, the mere fact that the Petitioners may have been parties below does not confer on them standing in this Court. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *Princeton University v. Schmidt*, 455 U.S. 100, 102 n (1982). It is Petitioners' burden to establish their standing to invoke this Court's jurisdiction and to overcome the presumption against such jurisdiction. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986), quoting *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887).

Respondent respectfully submits that the state Legislature, the petitioning organizations, and many individual petitioners lack standing sufficient under article III to invoke this Court's jurisdiction.

A. The California Legislature Lacks Standing To Invoke This Court's Jurisdiction

Respondent acknowledges that this Court has accorded legislatures standing, on behalf of government, to *defend* the validity of legislative enactments in cases where the Executive was unwilling to do so. See e.g., *Karcher v. May*, 484 U.S. 72 (1987) [State legislature permitted to intervene where no member of the Executive Branch willing to defend an enacted statute]; *I.N.S. v. Chadha*, 462 U.S. 919 (1983) [Senate permitted to intervene in case where Executive had indicated its agreement that challenged statute was unconstitutional]. However, this is plainly not such a case. Here, the Legislature seeks to

invalidate state constitutional amendments which were enacted by the people and, indeed, it has sued officials of the Executive Branch for that purpose.

Respondent also acknowledges that the Legislature and its constituent houses were parties to the proceeding below. However, those proceedings involved additional state law questions in which the Legislature arguably had a justiciable interest *under the state Constitution*. In particular, those proceedings involved the question whether Proposition 140 invaded the Legislature's prerogative to propose *revisions* to the California Constitution by, among other things, imposing a ceiling on legislative expenditures and limiting legislators' terms of office. See *Legislature v. Eu, supra*, 54 Cal.3d at 506-512.

In any event, even if the state Supreme Court could be said to have permitted the Legislature to assert the rights of third parties, that fact does not determine this Court's power to do so. *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).[17] And respondent submits that the instant petition affords no basis upon which the Legislature may claim standing before this Court.

It is beyond cavil that the Constitution vests no rights in state governments which may be asserted in derogation of the sovereign power of the people. The California Legislature and its constituent houses are merely the creatures of the people of the State of California. Cal. Const., art. II, § 1; art. IV, § 1. As such, the Legislature is

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[17] The California court gave no indication of the basis for the Legislature's standing. Indeed, the issue was not briefed by the parties.

possessed of no privileges or immunities whatsoever under the Federal Constitution which may be asserted against its creator. See *Williams v. Mayor*, 289 U.S. 36, 40 (1933); *Coleman v. Miller*, 307 U.S. 433, 441 (1939).

Indeed, the Legislature does not purport to allege any right or interest possessed in itself which supports this Court's jurisdiction. Instead, the petition alleges deprivation of the First and Fourteenth Amendment rights of *individual voters* and *candidates*, and alleges that Proposition 140 unconstitutionally sought to punish *individual legislators*.[18]

It is, of course, the general rule that a federal petitioner cannot rest *its* standing upon the rights or interests of the other individual or organizational Petitioners. Rather, each petitioner must establish its standing by demonstrating unconstitutional injury to *itself*. *Valley Forge College v. Americans United*, 454 U.S. 464, 472-476 (1982); *Warth v. Seldin*, 422 U.S. 490, 498-500 (1975).

Moreover, it cannot reasonably be argued that the Legislature has standing as representative of *legislators*, adverse to the people of California. Cf., *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977). Indeed, it would constitute a gross violation of principles of federalism for this Court to recognize standing in the Legislature to assert the rights of member legislators in derogation of the will of the people of California. A

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[18] The Legislature, as such, is not within the zone of protection of the Bill of Attainder Clause, which encompasses only individuals and private groups – "those who are particularly vulnerable to nonjudicial determinations of guilt." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

"short definition of [a republican form of] Government is one constructed on this principle[:] that the Supreme Power resides in the body of the people." *Chisolm Ex'r v. Georgia*, 2 U.S. 419, 457 (1793) (Opn. of Iredell, J.)

The *Legislature's* remedy is political. If the Legislature believes it necessary to reverse or modify the changes worked by the Political Reform Act of 1990, the Legislature is expressly authorized to propose for adoption by the people a new amendment to the California Constitution for that purpose. Cal. Const., art. VIII, § 1.

B. Petitioner Organizations Have No Demonstrable Standing To Bring This Petition

Petitioners California Teachers Association (CTA) and Black American Political Association (BAPAC) similarly lack standing to invoke this Court's jurisdiction. The petition herein alleges no injury to either of these organizations which support their standing. Whatever standing they may have, therefore, "turns upon whether . . . the organizations have established actual injury to any of their members." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).[19] An association may sue on behalf of its members if the association alleges that, as a result of the challenged action, its members are suffering immediate or threatened injury of the sort that would make out a justiciable case had the members themselves brought suit. *Warth v. Seldin, supra*, 422 U.S. 490, 511.

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[19] Petitioner organizations do not purport to allege that either they or their members were subjected to nonjudicial punishment in violation of the Bill of Attainder Clause.

In the petition below, CTA alleged only a generalized interest in education and the impact of Proposition 140 on education in California. See A-3, ¶ 9, *post*. Such a generalized interest is insufficient for article III purposes. *Asarco Inc. v. Kadish*, 490 U.S. 605, 614-615, 616 (1989).

Petitioner BAPAC alleged no infringement of its members' rights to vote, but only complained vaguely that term limits "will reduce the number of black public officials who can and will stay in office long enough to provide advice and help to members of the Association and to other African-Americans in California political life." A-3, ¶ 10, *post*. Inasmuch as BAPAC's members would have been unable to state a constitutionally cognizable case or controversy relying on such a vague political interest, BAPAC itself has no standing within the meaning of article III to assert such a claim. Furthermore, it is not likely that BAPAC's members would obtain relief from the alleged injury as a result of a favorable decision by this Court. The mere lifting of term limitations will do little to ensure a sufficient supply of African-American legislators willing "to provide advice and help to members of the Association and to other African Americans in California political life." For this reason, too, BAPAC has insufficient demonstrable standing. *Renee v. Geary, supra*, 111 S.Ct. at 2337.

C. Certain Individual Petitioners Lack Standing To Invoke This Court's Jurisdiction

The petition alleges that the term-limitation provisions of the Act violate Petitioners' rights as voters or as

candidates, or that the Act amounts to an unconstitutional bill of attainder. However, not all of the Petitioners challenged the Act on these grounds in the proceedings below.

Petitioners Hart, Huffman, Post, Seiler, and Thompson alleged no injury to their rights as voters or candidates resulting from term limitations. In the proceedings below, they complained only about aspects of the Act which are not here challenged. Petitioner Senator Hart, for example, alleged no intention to run for office at the expiration of his present four-year term. A-4, ¶ 13, *post*. Neither did he submit any declaration attesting to such an intention. Senator Hart's concern in the proceedings below was limited to his retirement benefits. *Ibid*.

Petitioner Alice Huffman alleged no injury to her right to vote, but complained only that the lack of pension benefits and "job security" resulting from term limitations would discourage her from running for office. A-7, ¶ 25, *post*. In her supporting declaration, Ms. Huffman stated: "The limitation to 8 years of service and the elimination of the Legislative Retirement System make it impossible for me to surrender a secure job with a generous pension benefit in exchange for the possibility of a short-term job with no retirement advantages."[20]

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[20] Ms. Huffman's declaration also stated her desire to vote for Assemblyman Lloyd Connelly in 1996, although "it is [her] understanding that Proposition 140 will bar him from being a candidate for re-election in 1996." However, Assemblyman Connelly was not a petitioner; nor did he submit a declaration

(Continued on following page)

Petitioner A. Alan Post sued as "the former Legislative Analyst of the State of California." There were no allegations by Mr. Post of any infringement on his rights as a voter, as a candidate, or in any other capacity. A-3, ¶ 8, *post*.

Petitioner Deborah Seiler alleged no injury to her rights as a voter. She complained only about loss of employment due to the ceiling which the Act imposed on the Legislature's operating budget. A-8, ¶ 27, *post*.

Finally, petitioner Steve Thompson alleged no injury to his rights as a voter. Mr. Thompson complained only about the Act's restrictions on the Legislature's budget and the effect thereof on the Assembly Office of Research. A-3, ¶ 30, *post*.

None of these foregoing Petitioners alleged that the Act infringed on their First or Fourteenth Amendment right of candidacy or right to vote. None, therefore, has demonstrated sufficient standing to invoke this Court's jurisdiction. See 28 U.S.C. § 1257(a).

To summarize, then: Respondent respectfully submits that the petition of the California Legislature, its constituent houses, the California Teachers Association, the Black American Political Association, Senator Gary Hart, Allice Huffman, A. Alan Post, Deborah Seiler, and Steve Thompson must be denied for lack of standing to invoke this Court's jurisdiction.

(Continued from previous page)

of any intention to run for Assembly in 1996. Moreover, Ms. Huffman's support for Assemblyman Connelly could well conflict with her own aspirations to run for office.

III

NONE OF THE PETITIONERS ALLEGES THAT HE OR SHE WAS SUBJECTED TO NONJUDICIAL PUNISHMENT IN VIOLATION OF THE BILL OF ATTAINDER CLAUSE

None of the Petitioners alleged below that he or she was the victim of nonjudicial punishment in violation of the Bill of Attainder Clause, U.S. Const., art. I, § 10, cl. 1. Nothing more was alleged than this conclusory averment:

> The legislative term limits, restrictions on legislative retirement benefits, and reductions in expenditures for the Legislature contained in Proposition 140 constitute a bill of attainder prohibited by Article II [*sic*], section 10 of the Constitution of the United States. The text of the measure, the arguments submitted in the ballot pamphlet, and campaign speeches made and materials distributed by is proponents leave no doubt that the initiative was intended to punish members of the Legislature, particularly Petitioners Brown and Roberti.

A-14, ¶ 52, *post*.

Petitioners Brown and Roberti, however, did not allege that they alone were *singled out* for punishment; it is beyond dispute that the term-limitation provisions of Proposition 140 *apply without regard to the identity of the incumbent office holder*. The California Supreme Court concluded that "the ballot arguments contain no indication of an intent to *punish* [Messrs Brown or Roberti] for any past misconduct. Broad reform measures are frequently prompted by particular acts or circumstances involving specific individuals. . . . " *Legislature v. Eu, supra*, 54 Cal.3d at 527 (emphasis in original); see also, *Collin v.*

Smith, 447 F.Supp. 676, 682 n.4 (N.D.Ill 1978) ["A law of general applicability is not unconstitutional [as a bill of attainder] merely because its enactment was inspired by a specific example of the evil which it seeks to suppress"], *aff'd on other grounds*, 578 F.2d 1196 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

Before this Court, Petitioners acknowledge that, "Proposition 140 on its face applies to all future incumbents," but aver that "the motivation for its adoption . . . was punishment of . . . present incumbents." Pet. at 23. Respondent submits that, on its face, the petition fails to demonstrate a case or controversy under the Bill of Attainder Clause. Whether or not dissatisfaction with Petitioners Roberti and/or Brown was a motivation for passage of the proposition, the undeniable fact is that these Petitioners were not singled out as regards the *effect* of Proposition 140's terms.

CONCLUSION

For the reasons stated, the Court should deny the petition for certiorari.

DATED: February 7, 1992

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
ROBERT L. MUKAI
Chief Assistant Attorney General
FLOYD D. SHIMOMURA
Assistant Attorney General
(Acting)
DANIEL G. STONE
Deputy Attorney General

MANUEL M. MEDEIROS*
Deputy Attorney General

Attorneys for Respondent
March Fong Eu
Secretary of State

*Counsel of Record

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE LEGISLATURE OF THE STATE OF CALIFORNIA, THE SENATE OF THE STATE OF CALIFORNIA, THE ASSEMBLY OF THE STATE OF CALIFORNIA,	)	No. S019660
DAVID ROBERTI, WILLIE BROWN, JR., KENNETH L. MADDY, WILLIAM A. CRAVEN,	)	*PETITION FOR WRIT OF MANDATE AND/ OR PROHIBITION*
A. ALAN POST,	)	
ED DAVIS, CECIL GREEN, GARY K. HART, BILL LOCKYER, DAN MCCORQUODALE, ROBERT B. PRESLEY, DIANE WATSON,	)	
BRUCE BRONZAN, PETER R. CHACON, JIM COSTA, DAN E. HAUSER, JOHAN KLEHS, BARBARA LEE, LUCILLE ROYBAL-ALLARD,	)	
ALICE HUFFMAN, AURORA CASTILLO, DEBORAH SEILER, MARSHALL SHARPE, PERCY STEELE, STEVE THOMPSON, NEWTON WALLACE,	)	
Petitioners,	)	
v.	)	
MARCH FONG EU, SECRETARY OF STATE; GRAY DAVIS,	)	

CONTROLLER; BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM; CONNY MCCORMACK, SAN DIEGO COUNTY REGISTRAR OF VOTERS,

Respondents.

TO THE HONORABLE MALCOLM M. LUCAS, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Each of the petitioners brings this petition for writ of mandate and/or prohibition in response to passage of Proposition 140 at the November 6, 1990 general election Proposition 140 amended the California Constitution to impose term limits on legislative and other statewide offices, to reduce and limit the Legislature's budget by approximately 38%, and to prohibit legislators from participating in any retirement system other than federal Social Security. The measure violates both the state and federal Constitutions, and is the appropriate subject of this Court's original jurisdiction, for the reasons that petitioners allege as follows:

PARTIES

1. Petitioner LEGISLATURE OF THE STATE OF CALIFORNIA is the duly constituted legislative body of California, and that institution granted all the bicameral powers, and charged with the proper performance of all

the bicameral duties, of the legislative branch of the government of the State of California by Article IV, § 1 and related provisions of the California Constitution.

2. Petitioner SENATE OF THE STATE OF CALIFORNIA is the duly constituted Senate of the State of California, and is that institution granted all of the unicameral powers, and charged with the proper performance of all of the unicameral duties, of the Senate by Article IV, § 1 and related provisions of the California Constitution.

3. Petitioner ASSEMBLY OF THE STATE OF CALIFORNIA is the duly constituted Assembly of the State of California, and is that institution granted all of the unicameral powers, and charged with the proper performance of all of the unicameral duties, of the Assembly by Article IV, § 1 and related provisions of the California Constitution.

4. Petitioner DAVID ROBERTI is President Pro Tempore of the California Senate and Senator for the 23rd Senate District. He is a Democrat who has been a member of the Senate since 1971 and served in the California Assembly from 1966 to 1971. He is a member of the Legislators' Retirement System ("LRS") of the State of California, and, until November, 1990, he made regular contributions thereto, as did the state on his behalf. He is a citizen and resident of the City of Los Angeles. Senator Roberti plans to seek reelection in 1992, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1996.

5. Petitioner WILLIE L. BROWN, JR. is Speaker of the California Assembly and Assembly member for the 17th Assembly District. He is a Democrat who has been a

member of the Assembly since 1964 and Speaker since 1980. He is a member of the Legislators' Retirement System, and, until November, 1990, he made regular contributions thereto, as did the state on his behalf. He is a citizen and resident of the City and County of San Francisco. Speaker Brown plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by proposition 140, would seek reelection to the Assembly in 1996.

6. Petitioner KENNETH L. MADDY is the Republican Leader of the California Senate and represents the 14th Senate District. He has served in the Senate since 1979 and was a member of the California Assembly from 1970 to 1979. He is a member of the Legislators' Retirement System, and, until November, 1990, he made regular contributions thereto, as did the state on his behalf. He is a citizen and resident of the City of Fresno. Senator Maddy plans to seek reelection in 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998.

7. Petitioner WILLIAM A. CRAVEN is the Senator from the 38th Senate District. He has served in the Senate since 1978 and was a member of the Assembly from 1973 to 1978. He is a member of the Legislators' Retirement System, and, until November, 1990, made regular contributions thereto, as did the state on his behalf. He is a Republican and vice-chairman of the Senate Elections and Reapportionment Committee and the Senate Rules Committee. Senator Craven plans to seek reelection in 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998.

8. Petitioner A. ALAN POST is a resident of the State of California and a taxpayer. He is the former Legislative Analyst of the State of California, having served in that position from 1949 through 1977.

9. Petitioner CALIFORNIA TEACHERS ASSOCIATION represent more than 177,000 teachers in the state of California. The association and its members have a strong and continuing interest in the quality of education in this state and in legislation affecting education. The imposition of term limits and severe budget cuts will result in a Legislature less equipped to respond to the educational needs of the children of this state and one less able and willing to respond to the local educational needs that members of the Legislature have historically worked to serve.

10. Petitioner BLACK AMERICAN POLITICAL ASSOCIATION OF CALIFORNIA is a membership organization composed of black elected public officials in the state of California. The organization itself and its members have benefited from association with experienced black elected legislative leaders African American Californians have historically had more difficulty in achieving political office. The imposition of term limits will reduce the number of black public officials who can and will stay in office long enough to provide advice and help to members of the Association and to other African Americans in California political life.

11. Petitioner ED DAVIS is the Senator for the 19th Senate District. He has served in the Senate since 1980 and is a member of, and, until November 1990, made

regular contributions to the Legislators' Retirement System for ten years, as did the state on his behalf. He is a Republican and vice-chairman of the Senate Judiciary Committee. He is a citizen and resident of the City of Valencia. Senator Davis plans to seek reelection in 1992, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1996.

12. Petitioner CECIL GREEN is the Senator for the 33rd Senate District. He is a Democrat and has served in the Senate since 1987, representing a Los Angeles area district. He is a member of the Legislators' Retirement System, and, until November, 1990, he regularly made contributions thereto, as did the state on his behalf. Senator GREEN plans to seek reelection in 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998.

13. Petitioner GARY K. HART is the Senator for the 18th Senate District. He is a Democrat and has served in the Senate since 1982, representing a Santa Barbara district. From 1974 to 1982 he served in the Assembly. He is a member of the Legislators' Retirement System, and, until November, 1990, regularly made contributions thereto, as did the state on his behalf. He was born on August 13, 1943. On January 1, 1991, but for the effects of Proposition 140, he would have had 16 years' credited service in the LRS. In 1990, upon achieving 15 years' credited service, he became eligible for early retirement with full benefits less 2% for each year under age 60 by virtue of the provisions of section 9359.16 of the Government Code. Proposition 140 prevents him from continuing to accrue service, and therefore from fully accruing this benefit, because years of credited service are part of

the formula upon which his retirement benefits would be based were it not for Proposition 140.

14. Petitioner BILL LOCKYER is the Senator for the 10th Senate District. He has served in the Senate since 1982 and was a member of the Assembly from 1973 to 1982. He is a Democrat and chairman of the Senate Judiciary Committee. He is a member of the Legislators' Retirement System, and, until November, 1990, he made regular contributions thereto, as did the state on his behalf. He is a citizen and resident of the City of Hayward. Senator Lockyer plans to seek reelection in 1994 and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998.

15. Petitioner DAN McCORQUODALE is the Senator from the 12th Senate District. He is a Democrat and has served in the Senate since 1982, representing a San Jose area district. He is a member of the Legislators' Retirement System, and, until November, 1990, regularly made contributions thereto, as did the state on his behalf. Senator McCORQUODALE plans to seek reelection in 1994 and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998. He will be 60 years of age on December 17, 1994 and eligible for retirement under the LRS. But for Proposition 140 and the resultant actions of respondents Controller and Public Employees Retirement System ("PERS"), he would then have been credited with 12 years' service in the LRS and eligible for retirement benefits at a higher rate because he would have been credited for service between 1991 and 1994.

16. Petitioner ROBERT B. PRESLEY is the Senator from the 36th Senate District. He has served in the Senate since 1974. He is a member of the Legislators' Retirement System, and, until November, 1990, made regular contributions thereto, as did the state on his behalf. He is a Democrat and chairman of the Senate Appropriations Committee and the Joint Legislative Committee on Prison Construction and Operations. Senator Presley plans to seek reelection in 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998.

17. Petitioner DIANE WATSON is the Senator for the 28th Senate District. She has served in the Senate since 1978, representing a district in Los Angeles composed largely of members of minority races. She is a member of the Legislators' Retirement System, and, until November, 1990, she regularly made contributions thereto, as did the state on her behalf. She is Democrat and chairs the Senate Health and Human Services Committee. She is a citizen and resident of Los Angeles. Senator Watson plans to seek reelection in 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Senate in 1998.

18. Petitioner BRUCE BRONZAN is the Assembly member from the 31st Assembly District. He is a Democrat and has served in the Assembly since 1982, representing a Fresno area district. He is a member of the Legislators' Retirement System, and, until November, 1990, he regularly made contributions thereto, as did the state on his behalf. Petitioner BRONZAN plans to seek reelection in 1992 and 1994 and, but for the term limits imposed by Proposition 140, would seek reelection to the

Assembly in 1996. He will be 51 years old on September 28, 1998. If reelected, in the absence of Proposition 140 he would have in 1998 sixteen years' credited service under the LRS and be eligible for early retirement less 18% (2% x 9 years). Proposition 140 purports to prevent him from accruing this benefit.

19. Petitioner PETER R. CHACON is the Assembly member from the 79th Assembly District. He is a Democrat and has served in the Assembly since 1970, representing a San Diego area district. He is a member of the Legislators' Retirement System and, until November, 1990, he regularly made contributions thereto, as did the state on his behalf. Petitioner CHACON plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Assembly in 1996.

20. Petitioner JIM COSTA is the Assembly member from the 30th Assembly District. He is a Democrat and has served in the Assembly since 1978, representing a Fresno area district. He is a member of the Legislators' Retirement System, and, until November, 1990, he regularly made contributions thereto, as did the state on his behalf. Petitioner COSTA plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Assembly in 1996. If reelected, in 1998 he will be 46 years of age and would have had, but for the effects of proposition 140, 20 years' credited service in the LRS. At that time he would have been eligible for early retirement with full benefits. Proposition 140 purports to prevent him from accruing this benefit.

21. Petitioner DAN E. HAUSER is the Assembly member from the 2nd Assembly District. He is a Democrat and has served in the Assembly since 1982, representing a district in the Eureka area. He is a member of The Legislators' Retirement System, and, until November, 1990, he regularly made contributions thereto, as did the state on his behalf. Petitioner HAUSER plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Assembly in 1996. He was born on June 18, 1942. By June 18, 1992 he will be 50 years of age and within 10 years of the LRS's retirement age. By that time, but for the effects of Proposition 140, he would have been credited with at least eight years of service under the LRS and eligible for state contributions, before and during retirement, to health care and dental care plans. Proposition 140 purports to prevent him from accruing this benefit.

22. Petitioner JOHAN KLEHS is the Assembly member from the 14th Assembly District. He has served in the Assembly since 1982, representing a district in Alameda County. He is a Democrat and Chairman of the Assembly Revenue and Taxation Committee. Petitioner KLEHS plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Assembly in 1996. He is informed by respondent EU that her office will refuse to accept his declaration of intention to be a candidate for Assembly in 1996 because election to such a term is barred by Proposition 140.

23. Petitioner BARBARA LEE is the Assembly member from the 13th Assembly District. She was elected to the Assembly on November 6, 1990, and is serving her

first term in the Legislature. Petitioner LEE is a Democrat who represents an Alameda County district that includes the City of Oakland and that is composed largely of members of minority races. She would not have sought election to the Assembly had she known that her ability to influence events would be constrained by an arbitrary six year term limit rather than by her constituents' satisfaction with her performance. Petitioner LEE plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Assembly in 1996.

24. Petitioner LUCILLE ROYBAL-ALLARD is the Assembly member from the 56th Assembly District. She is a Democrat who has served in the Assembly since 1987, representing a district in Los Angeles. She is a member of the Legislators' Retirement System, and, until November, 1990, she regularly made contributions thereto, as did the state on her behalf. Petitioner ROYBAL-ALLARD plans to seek reelection in 1992 and 1994, and, but for the term limits imposed by Proposition 140, would seek reelection to the Assembly in 1996. If reelected, by 1998 she will be 57 years old, within 10 years of the LRS's retirement age, and, except for the effects of Proposition 140, would have been credited with more than eight years of service in the LRS. At that time she would have been eligible for state contributions, before and during retirement, to health and dental care plans. Proposition 140 purports to prevent her from accruing this benefit.

25. Petitioner ALICE HUFFMAN is a resident and duly qualified elector of the County of Sacramento. She is currently employed as Associate Executive Director for

Governmental Relations for the California Teachers Association, is earning more than the salary of a member of the Legislature, and benefits from a pension plan in addition to her participation in federal Social Security. She is considering whether to run for the Senate in 1992, but for personal financial reasons will be unable to do so if the provisions of Proposition 140 are in effect. She wishes to file a declaration of candidacy, but cannot file a declaration under penalty of perjury stating her intention to run until she knows whether Proposition 140 will be in effect.

26. Petitioner AURORA CASTILLO is a duly qualified elector, voter and taxpayer of the County of Los Angeles, California and the 56th Assembly District. She is a supporter of, has voted for, and wants again to vote for, petitioner LUCILLE ROYBAL-ALLARD, whose tenure and leadership have in petitioner CASTILLO's opinion made petitioner ROYBAL-ALLARD an extremely effective representative for her constituents. As a Latina, petitioner CASTILLO believes that it will be extremely difficult to obtain the same effectiveness of representation of her interests from any other candidate for the Assembly and that her interests as a voter and constituent will be unconstitutionally impaired if she is prevented from reelecting petitioner ROYBAL-ALLARD to the Assembly because of the term limits imposed by Proposition 140.

27. Petitioner DEBORAH SEILER is a citizen and resident of the State of California and a taxpayer. From September 1985 until January 31, 1991, she was employed as the Chief Consultant to the Assembly Elections, Reapportionment and Constitutional Amendments Committee. Prior to her employment by the Assembly, petitioner SEILER was the Assistant Secretary of State for Elections

and Political Reform. She left her job with the Assembly because of the budget cuts required by Proposition 140.

28. Petitioner MARSHALL SHARPE is a duly qualified elector and voter of the 79th Assembly District. He is a constituent and supporter of petitioner PETER R. CHACON, has voted for him in the past, wants to vote for her in the future, and believes that his tenure and leadership have made him an extremely effective representative of his constituents. Petitioner SHARPE is an African American who believes that it will be extremely difficult to obtain the same effectiveness of representation of minority interests from any candidate for the Senate other than petitioner CHACON and that his interest as a voter and constituent will be unconstitutionally impaired if he is prevented from reelecting petitioner CHACON to the Assembly because of the term limits imposed by Proposition 140.

29. Petitioner PERCY STEELE is a duly qualified elector and voter of the 17th Assembly District. He is a constituent and supporter of petitioner WILLIE L. BROWN, JR., has voted for him in the past, wants to vote for him in the future, and believes that his tenure and leadership, especially as Speaker of the Assembly, have made him an extremely effective representative of his constituents. Petitioner STEELE is an African American who believes that it will be extremely difficult to obtain the same effectiveness of representation of minority interests from any candidate for the Assembly other than petitioner BROWN and that his interests as a voter and constituent will be unconstitutionally impaired if he is prevented from reelecting petitioner BROWN to the

Assembly because of the term limits imposed by Proposition 140.

30. Petitioner STEVE THOMPSON is a citizen and taxpayer of the State of California. Since 1985, he has been employed as the Director of the Assembly Office of Research. The budget cuts required by Proposition 140 drastically reduce the ability of his office to provide the Assembly with information needed for its deliberative process.

31. Petitioner NEWTON WALLACE is a duly qualified elector and voter of the 4th Assembly District and the 2nd Senate District. He is a constituent and supporter of Assembly member Thomas M. Hannigan and Senator Barry Keene, has voted for each of them in the past, wants to vote for each of them in the future, and believes that their respective tenures and leadership have made them extremely effective representatives of their constituents. Petitioner WALLACE believes that it will be extremely difficult to obtain the same effectiveness of representation of his interests from any candidate for the Assembly other than Mr. Hannigan or from any candidate for the Senate other than Mr. Keene and that his interest as a voter and constituent will be unconstitutionally impaired if he is prevented from reelecting Mr. Hannigan to the Assembly or Mr. Keene to the Senate because of the term limits imposed by Proposition 140.

32. Respondent MARCH FONG EU is the Secretary of State of the State of California. She has advised petitioners that she will refuse to certify and will advise local

registrars to refuse to accept, any declaration of candidacy from any candidate who would not be eligible to serve pursuant to Proposition 140.

33. Respondent GRAY DAVIS is Controller of the State of California and responsible for issuing warrants drawn on the state treasury for expenditures authorized by the Rules Committees of the Assembly and the Senate. Respondent DAVIS will not issue warrants in amounts greater than those constitutionally permitted by Proposition 140. He is also responsible for issuing warrants in the form of paychecks to individual members of the Legislature, which reflect the amount of their contributions to the Legislators' Retirement System, and for depositing into the Legislators' Retirement Fund both members' contributions and the state contributions required by statute. Since November 21, 1990, he has refused to issue paychecks to members of the Legislature that make deductions for members' contributions to the Legislators' Retirement System and has refused to deposit into the Legislators' Retirement Fund either members' or state contributions.

34. Respondent BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM ("PERS") is the agency responsible for administering the Legislators' Retirement System and for crediting service to the accounts of petitioners and other members of the LRS. Since November, 1990, PERS has refused to credit petitioners for service in the Legislature by reason of the provisions of Proposition 140.

35. Respondent CONNY MCCORMACK is Registrar of Voters of San Diego County. She has advised

petitioners that she will refuse to accept declarations of candidacy from candidates who are ineligible by reason of Proposition 140.

FACTUAL ALLEGATIONS

36. On June 27, 1990, respondent EU certified Proposition 140 as having sufficient petition signatures to appear on the November general election ballot. On November 6, 1990, Proposition 140 was approved by 52.17% of those who voted in the general election. Pursuant to Article II, section 10(a) of the California Constitution, the measure became effective the day after the election, except for those provisions that provide otherwise. A true and correct copy of the measure, together with the ballot pamphlet materials submitted to the voters, appears as Exhibit A to the Memorandum of Points and Authorities in Support of this Petition (hereafter "Exh. A.")

37. Proposition 140 was presented to the voters as an initiative constitutional amendment with three principal components:

a. The measure provides that no Senator may serve more than two four-year terms and no member of the Assembly may serve more than three two-year terms. The limitation is not restricted to consecutive terms, but constitutes a life-time prohibition that prevents any individual who has served the maximum number of terms from ever serving in the Senate or the Assembly again. The measure also prevents statewide constitutional officers, with the exception of the Insurance Commissioner, from serving more than two four-year terms.

b. The measure provides that legislators elected to the Legislature or serving in it on or after November 1, 1990, shall participate in the federal Social Security system and the state shall pay only the employer's share necessary to that program. Contributions by or on behalf of legislators to the Legislators' Retirement System after the effective date of the measure are prohibited, and the measure specifically provides that "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation." (Exh. A, section 4.) Retirement benefits for other statewide officers are not affected.

c. The measure provides that in the 1990-91 fiscal year "the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the operating expenses and equipment for, the Legislature may not exceed an amount equal to nine hundred fifty thousand dollars ($950,000) per member for that fiscal year or 80 percent of the amount of money expended for those purposes in the preceding fiscal year whichever is less." (Exh. A, section 5.) The measure limits future increases in expenditures for the Legislature to "an amount equal to the percentage increase in the appropriations limit for the state established pursuant to Article XIIIB [of the California Constitution]." (Ibid.)

38. The measure also contains a declaration of purpose, which makes clear that it is directed almost exclusively at incumbent legislators. The declaration, which is to be added as section 1.5 of Article IV of the California Constitution, reads in part:

> The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support

services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.

To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

(Exh. A, section 2.)

FIRST CAUSE OF ACTION
(Constitutional Revision)

39. Since 1849, the California Constitution has provided a system of government comprised of three coequal branches – legislative, executive, and judicial. (Article III, § 3.) Although not entirely separate, the powers of one branch may not be exercised by another, and like the federal system, the three branches counterbalance and control one another through a careful scheme of checks and balances. Proposition 140 so weakens the Legislature that it works a far-reaching and fundamental change in our structure of government and disrupts and destabilizes the careful balance among the three branches. Such a

change amounts to a constitutional revision and cannot be done by constitutional amendment. (Article XVIII.)

SECOND CAUSE OF ACTION
(Single Subject)

40. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 39 above.

41. Proposition 140 violates Article II, section 8(d) of the California Constitution, which provides that an initiative embracing more than one subject may not be submitted to the voters or have any effect.

42. In order to satisfy the single subject rule, the provisions of an initiative must be functionally related to one another or reasonably germane to the general purpose or object of the initiative Proposition 140 has three distinct components that are not functionally related to one another. Further, it has at least two distinct objects or purposes: to limit the powers of incumbency and to restrict legislative spending. These disparate elements are included within the measure solely for the purpose of pooling the votes of those electors who favor term limits with those who favor reductions in expenditures by state government. Combining them into one measure violates the single subject rule and makes the initiative void and of no effect.

43. The changes wrought by Proposition 140 profoundly alter the structure of government in California. Where an initiative so thoroughly affects the governmental structure, close application of the single subject rule is necessary to prevent passage of measures more

sweeping than the majority of voters actually intend. Stricter scrutiny of a constitutional amendment is necessary to prevent a misuse of the initiative process.

THIRD CAUSE OF ACTION
(Violation of the First Amendment)

44. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 43 above.

45. The limits on the number of terms that may be served by members of the Legislature impermissibly infringe upon petitioners' fundamental rights to run for elective office, to vote and to associate, rights protected under the First and Fourteenth Amendments to the Constitution of the United States. By banning for life any individual from serving more than six years in the Assembly or eight years in the Senate, the term limits of Proposition 140 prohibit voters from returning to office those whom they believe have served them most effectively and faithfully, and functionally prohibit such voters from speaking or associating for that purpose.

46. Unless the term limits are declared unconstitutional, petitioner ALICE HUFFMAN will be unable to declare her intention to run for legislative office or to receive campaign contributions for that purpose. Senators ROBERTI, MADDY, CRAVEN, DAVIS, LOCKYER, PRESLEY, WATSON, GREEN, HART, and MCCORQUODALE and Assembly members BROWN, BRONZAN, CHACON, COSTA, HAUSER, KLEHS, LEE, and ROYBAL-ALLARD, and all of their colleagues currently in the Legislature will be unable to make plans for the introduction of

legislation whose passage may take a sustained effort over years to obtain. Petitioners AURORA CASTILLO, PERCY STEELE, MARSHALL SHARPE, and NEWTON WALLACE, and voters like them throughout the state, will be unable to decide whether to continue to support their incumbent Legislators and to work for their reelection. The rights of petitioners and millions of voters and constituents will be irreparably injured if Proposition 140 is allowed to go into effect.

FOURTH CAUSE OF ACTION
(Equal Protection)

47. Petitioners reallege and incorporate by reference if fully set forth herein the allegations contained in paragraphs 1 through 46 above.

48. The legislative term limit provisions of Proposition 140 unconstitutionally infringe upon the rights of petitioners CASTILLO, STEELE, SHARPE, and WALLACE to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, under the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution, and under Article I, section 7 of the California Constitution. Petitioner PERCY STEELE has long supported and wishes to continue to support his representative in the 17th district of the Assembly, who was reelected to office in 1990 by a majority of 64.19%. Petitioner STEELE and a majority of other voters in his Assembly District voted against Proposition 140. Despite their opposition to the measure and their support for their Assemblyman, they now find themselves prevented from voting for the candidate of

their choice due to term limitations imposed by a bare majority of voters outside their district, who purport to dictate to them whom they can and cannot support for reelection

49. The term limits of Proposition 140 deny to the legislative Petitioners the equal protection of the law by singling out for disparate and invidious treatment a class of incumbent legislators who have served the number of terms permitted by the measure and who are prohibited by the measure from ever running again. The term limit provisions of Proposition 140 have the same disparate impact on supporters of incumbents as alleged above.

50. By singling out legislators and denying them participation in the Legislators' Retirement System, while allowing other state constitutional officers to continue to participate, the initiative denies legislators the equal protection of the law. A scheme that removes all such benefits from legislators while allowing other constitutional officers to remain in the system is wholly irrational.

51. Unless the legislative term limit and retirement provisions of Proposition 140 are declared unconstitutional, petitioners' rights to equal protection and the enjoyment of the privileges and immunities of citizenship will be irreparably injured.

FIFTH CAUSE OF ACTION
(Bill of Attainder)

52. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 51 above.

53. The legislative term limits, restrictions on legislative retirement benefits, and reductions in expenditures for the Legislature contained in Proposition 140 constitute a bill of attainder prohibited by Article II [sic], section 10 of the Constitution of the United States. The text of the measure, the arguments submitted in the ballot pamphlet, and campaign speeches made and materials distributed by its proponents leave no doubt that the initiative was intended to punish members of the Legislature, particularly petitioners BROWN and ROBERTI.

SIXTH CAUSE OF ACTION
(Contract Clause)

54. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 53 above.

55. The prohibition on continuing participation in the Legislators' Retirement System contained in section 4 of Proposition 140 violates vested contractual rights of members of the Legislature who were elected before November 1, 1990, in violation of the Contract Clause contained in Article II, section 10 of the Constitution of the United States, by depriving them of their vested rights to continue to contribute to the LRS, to continue to benefit from state contributions, and to become eligible for all the length-of-service benefits of the LRS that they would enjoy but for the provisions of Proposition 140.

56. Unless ordered to do otherwise by this Court, respondents will continue to deny petitioners their right to make contributions to the Legislators' Retirement System, and will continue to withhold state contributions to

petitioners' accounts and will continue to refuse to credit petitioners' LRS accounts for legislative service.

SEVENTH CAUSE OF ACTION
(Guaranty Clause)

57. Petitioners reallege and incorporate by reference if fully set forth herein the allegations contained in, paragraphs 1 through 56 above.

58. The provisions of Proposition 140 violate the Guaranty Clause of article IV, section 4 of the Constitution of the United States, which guarantees to every state a republican form of government. A republican form of government is a representative one, in which the citizens elect a smaller number of individuals to represent them in enacting laws and overseeing their enforcement. Two principles are central to the definition of republican government: the right of each citizen to vote for the candidate of his or her choice and the relative equality and separation of powers among the three branches of government. The measure prohibits voters from voting for the candidates of their choice and alters the balance of power among the three branches so that the Legislature is unable to perform its constitutional functions, in violation of the Guaranty Clause.

EIGHTH CAUSE OF ACTION
(Impairment of Essential Government Functions)

59. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 58 above.

60. The term limits and budget cuts imposed by Proposition 140 render the Legislature unable to perform adequately its constitutional functions to set state policy, review and enact legislation, and oversee the activities of the executive and judicial branches as contemplated by the California Constitution. The initiative process may not be used to enact a measure which will greatly impair or wholly destroy an essential government function, and the measure is therefore void.

NINTH CAUSE OF ACTION
(Necessity for Mandamus)

61. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 60 above.

62. If the provisions of Proposition 140 are allowed to go into effect, petitioners and each of them will be irreparably injured and their constitutional rights impermissibly impaired. Petitioners have no plain, speedy or adequate remedy at law. Regardless of their opinion of the measure's validity, state agencies are barred by Article III, section 3.5 of the California Constitution from declaring the initiative unconstitutional or refusing to enforce it. Unless ordered to do otherwise by this Court, respondents will continue to implement the provisions of Proposition 140, and petitioners' rights will be gravely impaired.

63. Original relief in this Court is appropriate because the novel questions presented are of broad public interest and require speedy resolution. The Legislature

has already lost large numbers of employees in anticipation of the budget cuts that take effect July 1, 1991, and faces imminent loss of many more. This injury is irreparable. The term limits are having an immediate adverse effect on the capacity of legislators to plan future candidacies and to develop long-term legislative programs. Finally, respondents have since November been barred from accepting or making contributions to the Legislators' Retirement System, causing immediate and irreparable injury to the legislator petitioners. Adjudication in any lower court will delay final resolution of petitioners' challenge to the measure. Such delay is not in the interests of the government or the people of California.

WHEREFORE, petitioners pray for relief as follows:

1. That this Court issue its alternative writ of mandate or prohibition ordering Respondents (a) not to enforce any of the provisions of Proposition 140, *OR* (b) to show cause why a peremptory writ should not issue as set forth above;

2. That this Court set this matter for hearing at the earliest time consistent with its calendar;

3. That upon hearing and return, this Court issue its peremptory writ as prayed above;

4. That upon hearing and return, this Court declare the initiative null, void, and of no effect in its entirety; and

5. That this Court grant petitioners their costs and fees and such other and further relief as is just.

DATED: February 21, 1991

Respectfully submitted,
JOSEPH REMCHO
ROBIN B. JOHANSEN
LOWELL FINLEY
BARBARA A. BRENNER
CHARLES C. MARSON
REMCHO, JOHANSON
& PURCELL

DENISE HULETT
ANTONIA HERNANDEZ
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND

By /s/ ROBIN B. JOHANSEN
Attorneys for Petitioners

VERIFICATION

As the President Pro Tempore of the Senate of the State of California, I am an officer of the California Legislature. I am also an individual petitioner herein. I make this verification in my official and individual capacities.

I have read the foregoing Petition for Writ of Mandate and/or Prohibition and know its contents. The facts alleged in the petition are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 15th day of February, 1991, at Sacramento, California.

Legislature of the State of California

By /s/ David A. Roberti
President Pro Tempore of the Senate

VERIFICATION

As the Speaker of the Assembly of the State of California, I am an officer of the California Legislature. I am also an individual petitioner herein. I make this verification in my official and individual capacities.

I have read the foregoing Petition for Writ of Mandate and/or Prohibition and know its contents. The facts alleged in the petition are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 15th day of February, 1991, at Sacramento, California.

Legislature of the State of California

By /s/ Willie L. Brown
Speaker of the Assembly

VERIFICATION

I am one of the petitioners in this action. I have read the foregoing Petition for Writ of Mandate and/or Prohibition and know its contents. The facts alleged in Paragraph 29 of the petition are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct. Executed this 20th day of February, 1991 at San Francisco, California.

/s/ Percy H. Steele, Jr.

VERIFICATION

I, ROBIN B. JOHANSEN hereby declare as follows:

I am one of the attorneys for Petitioners herein and I make this verification because the Petitioners are absent from the county in which I have my office.

I have read the foregoing PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION and know the contents thereof. I certify that the same is true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 1991 at San Francisco, California.

/s/ Robin B. Johansen

FILED
FEB 10 1992
OFFICE OF THE CLERK

(3)

No. 91-1113

In The

Supreme Court of the United States

October Term, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

v.

MARCH FONG EU, et al.,

Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF RESPONDENT, CALIFORNIANS FOR A CITIZEN GOVERNMENT, IN OPPOSITION

RONALD A. ZUMBRUN
*JOHN H. FINDLEY
*Counsel of Record
DEBORAH J. MARTIN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Respondent, Californians for a Citizen Government

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether California's term limits, which bar any legislator who has served more than four years in office from running for that office again for the rest of his or her life, violate the First and Fourteenth Amendment rights of candidates and their supporters.

2. Whether a law which applies equally to all members of the Legislature and state executive officers and featured certain individuals in the campaign in favor of passing the initiative violates the Bill of Attainder Clause.

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No. 91-1113

In The

Supreme Court of the United States

October Term, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,

Petitioners,

v.

MARCH FONG EU, et al.,

Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF RESPONDENT, CALIFORNIANS FOR A CITIZEN GOVERNMENT, IN OPPOSITION

STATEMENT OF THE CASE

Recent calls for legislative term limitation are the direct result of the relatively new phenomenon of career politicians. Neither the California nor United States Constitutions originally provided for term limits of any kind. The Twenty-Second Amendment to the United States Constitution, adopted in 1951, which limited the office of the Presidency to two terms, was motivated by a desire to prevent "dynasty building." Californians decided that the same kind of corrective action was necessary to curtail

"dynasty building" in the legislative and executive branches of state government.

To halt, or at least slow, the increase of political careerism at the state level, the People of California enacted the Political Reform Act of 1990 (Act) with the passage of Proposition 140. In so doing, the People expressly identified the ills sought to be corrected by the Act:

> "The people find and declare that the Founding Fathers established a system of representative government based upon free, fair, and competitive elections. The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative.
>
> "The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent.
>
> "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted,

> state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served." Cal. Const. Art. IV, § 1.5.

In furtherance of its stated goals, the Act imposes three restrictions. First, the Act imposes term limits on legislators and state constitutional officers. The term limits are not retroactive. The petition addresses only the legislative term limits mandated by this provision of the Act. The other two restrictions limit the financial resources available to incumbents and redirects the legislative pensions to the Federal Social Security System.[1]

Despite brutal assaults on the initiative during the campaign, Proposition 140 received the popular support of California's electorate. Thereafter, having failed at the polls, those with a vested interest in staying in office filed suit in the California Supreme Court. Unsuccessful in the state's highest court, the state Legislature again flouts the will of the People and petitions this Court for review.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10.1 lists several criteria for the granting of a petition for certiorari. Petitioners here meet none of those requirements: there has been no split among the circuits, or among the state Supreme Courts; the decision below does not conflict with the opinions of

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[1] The pension provision is the subject of a petition for certiorari filed in this Court on January 8, 1992: *Californians for a Citizen Government v. Legislature*, No. 91-1114.

this Court; and petitioners present no new areas of law that have not already been settled by this Court. The arguments presented by petitioner represent only the desperation of incumbent legislators clinging to any slender reed of hope to perpetuate their time in office. For the reasons set forth below, this Court should deny the petition for certiorari.

A. There Is No Conflict with Other Decisions

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort, or of a Federal Court of Appeals. Petitioners have not, indeed cannot, point to any such conflict among the courts. The great majority of lower courts have never addressed the issue of term limits, and those few that have agree with the position of the California Supreme Court. In fact, petitioners themselves note that the West Virginia and Georgia Supreme Courts have upheld term limits. Petition at 7 n.7 (citing *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom. Moore v. McCartney*, 425 U.S. 927 (1976), and *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595, *cert. denied*, 397 U.S. 149 (1970)). Term limits at the local level also have been upheld in *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897 (W.D. Mo. 1990), and *Cawdrey v. Redondo Beach*, Los Angeles County Superior Court No. YC004071, *appeal pending*, California Court of Appeal, Second Appellate District, Case No. B056816.

Each court that has ruled on the issue has come to the same conclusion: term limitations on elected officials are constitutional.

B. The Political Reform Act of 1990 Does Not Violate the First or Fourteenth Amendment

Petitioners contend that the Act violates the federal constitutional rights of equal protection and free speech. These contentions have no merit. Even assuming the ability to hold elective office is entitled to some constitutional protection, the Act does not impermissibly infringe upon it. Nor does the Act burden anyone's right to vote.

1. Simply Because Term Limitation Relates to the Election Process Does Not Automatically Subject the Political Reform Act of 1990 to Strict Scrutiny

Petitioners falsely assume that simply because term limitation is related to the election process the Act must be "strictly scrutinized" for equal protection analysis. Petition at 8-9; petitioner's appendix (App.) at A-20. While the " 'right to vote, per se, is not a constitutionally protected right,' " *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)), both "[the California Supreme Court] and th[is] . . . Court have had frequent occasion to reiterate . . . the 'fundamental' nature of the right to vote." *Gould v. Grubb*, 14 Cal. 3d 661, 670 (1975).

Notwithstanding the importance of the franchise, regulations or classifications impacting the right to vote are *not* automatically reviewed under the strict scrutiny standard. Countless election provisions detailing the mechanisms of the election process may have such minimal impact on fundamental rights that they can properly be judged under the rational basis equal protection standard. *Gould v. Grubb*, 14 Cal. 3d at 670; *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Thus, innumerable laws and regulations which minimally affect the right to vote are analyzed under the lower standard of review of "rational basis."

However, even if term limitation can be characterized as a "ballot access" issue, thereby affecting to some degree the related concerns of both candidates and voters, such laws are *still* not subject to the "strict scrutiny" level of constitutional analysis. Because of the automatic or rote nature of strict scrutiny examination, this Court has rejected that analysis or "litmus test" in favor of the *Anderson* balancing test when reviewing ballot access restrictions in cases involving both candidates and voters. *Anderson*, 460 U.S. at 789. *See also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 233 (1989) (Stevens, J., concurring).

Petitioners rely on *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), and *Eu v. San Francisco County Democratic Central Committee* to support their argument that strict scrutiny combined with the "least drastic alternative" analysis is properly used in this case. Neither is properly applied. As the California Supreme Court stated in its decision:

> "[I]t seems clear the high court in *Eu [v. San Francisco County Democratic Central Committee]* imposed such a strict standard because of the serious impact on First Amendment freedoms of speech and association, interests not as directly impacted by Proposition 140, which does not affect speech interests and which impacts all political parties on an equal basis." App. at A-20 (citing *Eu*, 489 U.S. at 222-25).

Thus, the court below concluded that *Eu* is probably inapposite. App. at A-20. Furthermore, *Illinois State Board* was decided prior to *Anderson*. As the most recent pronouncement on the issue, *Anderson* must be deemed controlling. Nevertheless, the court below covered all bases by stating that "it is unlikely we would reach a different result applying strict scrutiny to evaluate Proposition 140." App. at A-20.

In *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989), which was cited with approval by the California Supreme Court (App. at A-20), the Ninth Circuit stated that in ballot access cases,

> "heightened scrutiny is not the rule. . . . Indeed, not since 1979 has the Supreme Court invoked 'strict scrutiny' to decide a ballot access case. . . . At other times, the Court has espoused such a level of scrutiny, only to abandon it upon application.
>
> "And in its two most recent forays into the ballot access arena, the Court has forsaken even the appearance of allegiance to strict scrutiny by neglecting even to utter its name." *Erum*, 881 F.2d at 692 n.7 (citations omitted).

Petitioners' talismanic incantation of "strict scrutiny" should not persuade this Court to abandon the balancing test outlined in *Anderson v. Celebrezze*, 460 U.S. at 786. This Court explained the balancing test as follows:

> "[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789.

Application of the correct equal protection analysis demonstrates that the Act is constitutional.

a. An Incumbent Has No Fundamental Right to Seek Reelection

Petitioners do not expressly state which fundamental right of incumbents is implicated by the Act. Indeed their best defense may well be ambiguity because no fundamental right *is* implicated. If petitioners claim that incumbent legislators have a fundamental right to seek elective office, and thus contend that a heightened level of scrutiny is appropriate, such a statement has no grounds in

the law. The right to hold public office, by itself, is not a fundamental right.

In *Bullock v. Carter*, 405 U.S. 134 (1972), this Court struck down a Texas filing fee law which required candidates for public office in primary elections to pay a potentially significant filing fee to gain access to the ballot. However, this Court did *not* invalidate the law because it infringed upon a person's interest in seeking public office:

> "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." *Id.* at 142-43.

This Court focused instead on the right to vote, recognizing that an impact on the right to seek office was related to the right to vote:

> "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143.

The law was stricken because the significant amount of the fees at issue directly impacted the rights of voters. This Court held that the "limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system" and who did not have the money to contribute toward payment of those costs. *Id.* at 144. This Court concluded that such an *economically* based restriction upon the franchise violates the Federal Constitution because it subjected the right to vote to a

monetary qualification. Such an *economic* burden on the right to vote, the Court held, required a compelling state interest which did not exist.[2]

Bullock and its progeny belie petitioners' assumption that the right of candidacy, standing alone, is a fundamental right. *See Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny' "); *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990), *cert. denied*, 113 L. Ed. 2d 241 (1991) ("[c]ontrary to appellant's assertion, the right to run for public office, unlike the right to vote, is not a fundamental right"); and *Zielasko v. State of Ohio*, 873 F.2d 957, 959 (6th Cir. 1989) ("contrary to Zielasko and Bowman's assertions, running for office is not a 'fundamental right' "). Because the right to candidacy, in and of itself is not fundamental, the state's interests need only be legitimate to outweigh petitioners' ability to run for reelection in perpetuity.[3]

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[2] Because *Bullock* was decided 11 years before *Anderson*, the analysis follows the old strict scrutiny language, rather than the modern balancing test applied to ballot access cases.

[3] *See also Storer v. Brown*, 415 U.S. 724 (1974). In *Storer*, this Court upheld a California statute which expressly prohibited placement on the ballot of the name of any independent candidate who had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election. This Court noted that the law was "an absolute bar to candidacy, *and a valid one.*" *Id.* at 737 (emphasis added). It is especially notable that *Storer* upheld an "absolute bar to candidacy" at a time well before this Court adopted the more lenient *Anderson* balancing test.

b. The Act Does Not Unconstitutionally Impair the Right to Vote

As the second prong to their attack, petitioners claim that the rights of those who wish to vote for incumbents (assuming those incumbents continue to be reelected for the full number of terms allowed under the Act) are unconstitutionally impaired. Petition at 14-16. Again, petitioners fail to grasp the correct analysis.

Notwithstanding the fact that the right to vote has been characterized as fundamental, that right is not absolute. *See Rivera-Rodriguez*, 457 U.S. at 9 (Puerto Rico law upheld which provided that if a commonwealth legislator died or resigned in office, the party of which the vacating legislator was a member had the right either to fill the empty seat outright, or hold an election for the seat, with only party members eligible to vote). The plaintiffs in that case argued that all voters had an absolute right to cast votes in the election to fill the vacant legislative seat. The Court, in upholding the law, stated that "this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one.' " *Id.* at 9 (citations omitted). *See also Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 95 (7th Cir. 1982).

The court below, in considering *Rivera*, determined that this Court gives "wide latitude to state election laws, even those that may restrict the electorate's choice of representatives, so long as those laws are applied in an even-handed manner without discriminating against particular citizens or classes of citizens." App. at A-21. The court below then correctly concluded that the Act's term limitations satisfy that standard. *Id.*

Thus, incidental infringements of that right are valid and permissible. *See Bullock; Clements* (in ballot access cases, *only* laws which affect voting rights by making distinctions on the basis of *wealth,* on the basis of the *political viewpoint* of the candidates excluded, or on the basis of *some suspect class* will be given close scrutiny). In fact, from a technical standpoint, all ballot access restrictions affect to some degree some individual's ability to vote for a particular candidate who may be excluded by the ballot restriction.

However, this fact alone is insufficient to create an unconstitutional infringement upon voting rights. Were the case otherwise, *all* ballot access restrictions would be subject to almost certain invalidation. Petitioners state that Melissa Eddy has voted for petitioner Ed Davis in the past and would like him to continue to be reelected. Petition at 11. Therefore, petitioners argue, Ms. Eddy's right to vote is unconstitutionally impaired by term limits. It is interesting to note, however, that while his district, predominantly located in Ventura County, decided to reelect Senator Davis, county residents also favored Proposition 140 by 52.7% to 47.3%. California Secretary of State, Statement of the Vote for November 6, 1990, at 65. Apparently both Ms. Eddy and Senator Davis are unconcerned with the voting rights of those who supported Proposition 140. Moreover, would the rights of Ms. Eddy be unconstitutionally impaired if Senator Davis moved out of state or was otherwise disqualified from running? Of course not. Ms. Eddy's rights are no more impaired than the rights of all Californians who voted for Paul Carpenter for the State Board of Equalization. Mr. Carpenter received the highest number of votes and

yet, as a convicted felon, was ineligible to serve. *Lubin v. Wilson*, 232 Cal. App. 3d 1422 (1991); Cal. Const. Art. VII, § 8. Under petitioners' strained analysis, all those who voted for Mr. Carpenter would be able to state a claim under the First Amendment. In any event, federal precedents demonstrate there is no right to vote for a particular candidate. *See Stiles v. Blunt*, 912 F.2d at 266 n.10; *Zielasko v. State of Ohio*, 873 F.2d at 961.[4]

Petitioners then refer to Ronald Reagan's 1980 presidential victory as evidence that members of the electorate may coalesce behind a particular candidate, again implying that such personal loyalty creates First Amendment rights. Petition at 14-15. What petitioners neglect to mention is that President Reagan, despite still enjoying substantial popularity through the end of his second term, could not run again for the Presidency. Not then, not ever again. United States Constitution, Twenty-Second Amendment. Citizens of the United States amended their Constitution so that no president, no matter what his personal following, could serve more than two terms in that office. In this case, citizens of California amended their constitution so that no legislator or constitutional

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[4] Although *Lowe v. Kansas City Board of Election Commissioners*, 752 F. Supp. 897, was resolved in the context of the federal Voting Rights Act, the language in that case is instructive:

> "In the present case plaintiffs principally complain that they are being denied a full opportunity 'to elect representatives of their choice.' . . . The simple answer . . . is that *all* members of the Kansas City electorate are being deprived of the right to elect council members for more than two consecutive terms." *Id.* at 899 (emphasis in original).

officer could serve more than two terms in that office. Yet petitioners do not suggest that the Twenty-Second Amendment nullified part of the First Amendment, or that the Act is unconstitutional as applied to statewide constitutional officers in California. Petition at 11 n.11. If petitioners' analysis were valid, then term limits for members of the executive branch would also be subject to a First Amendment right to vote challenge, yet petitioners deliberately avoid making that argument. *Id.* As meritless as petitioners concede the right to vote argument is as regards executive officers, so too is the argument meritless as regards legislative representatives.

Respondent does not claim that the right to vote is never a constitutionally protected right. However, under the proper equal protection analysis, the right to vote can be subject to reasonable governmental limitations, provided these limitations are content neutral and do not make economic or associational classifications. *Anderson*, 460 U.S. at 792-93. Petitioners' apparent position is that even though the Act is content neutral, creates no wealth-based classification, does not target a particular suspect class, does not target persons on the basis of political affiliation, and does not affect any particularized voter group, this Court should nevertheless strike the law as invalid.[5] Petitioners' position cannot be seriously

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[5] Petitioners suggest that a flaw in the Act is that it affects even legislators who served as independent and minority party members, out of the legislative mainstream. Petition at 15. Of course it does. To be written otherwise would be a content-based restriction on speech. Petitioners again make a salient point: the Act affects all officeholders equally--regardless of political viewpoint, race, gender, age, or any other possible classification.

considered, as the Act has placed at most an incidental burden upon the right to vote.

2. Term Limitation Advances Significant Public Policy Interests Which Far Outweigh Petitioners' Interests in Holding Public Office in Perpetuity

Ironically, petitioners' error in failing to apply the correct equal protection analysis is immaterial. Because even if this Court applied the highest standard of review, the Act would still easily meet the constitutional requirements. The Act provides the least restrictive means of preventing entrenched incumbents from assuming perpetual political control of state government, while ensuring continued access to public office by newcomers to the political process and encouraging civic participation in government.

The Act is an even-handed, nondiscriminatory law designed to meet important goals. It is designed to encourage civic participation by the citizens of California, to open the political process, to prevent entrenched incumbencies,[6] to discourage "bossism" and corruption,

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[6] The substantial advantages of incumbency held by California legislators were set forth as factual findings in a recent federal trial:

> "By virtue of the trial, the court has found that, as a general matter, incumbents have a significant natural advantage over challengers. Moreover, . . . an elected official can, and most do, (continued)

to foster the creation and implementation of new ideas for government, and to ensure that a significant variety of candidates can have an opportunity to serve in state government. Petitioners state that only experienced politicians have an incentive to speak as candidates and have the financial means to do so. Petition at 13 n.12. This is precisely the evil that term limits combat. The Act removes career politicians from that privileged class of money and power, opening up the field of candidates to those who do not have all the advantages of incumbency.

The compelling state interests supporting term limitation are already documented in case law and elsewhere. This established record should not be surprising in light of the fact that term limits are hardly a novel concept. "Over the years, term limits for Congress have been endorsed by the likes of Thomas Jefferson, Abraham Lincoln, Harry Truman, Dwight Eisenhower, and John F. Kennedy." CATO Institute, *Policy Analysis*, John H. Fund, "Term Limit~~ation: An~~ Idea Whose Time Has Come" 3 (Oct. 30, 1990). The policy reasons in favor of term limitation were amply explored in the court's decision below. The California Supreme Court accepted the arguments that

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raise substantial amounts of money each of the years of incumbency, while as a general matter challengers cannot, and generally do not, do so." *Service Employees International Union, AFL-CIO, CLC v. Fair Political Practices Commission*, 747 F. Supp. 580, 588 (E.D. Cal. 1990), appeal pending, Ninth Circuit Court of Appeals, Case No. 89-0433LKKJFM.

> "the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control." App. at A-26.

Furthermore, the court below firmly recognized the advantages that are inherent in the incumbency: "Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates." App. at A-29.

Term limitation is popularly supported by citizens nationwide and, as evidenced by passage of the Act, is similarly supported by the electorate of California. This support is justified by the numerous benefits from term limitation. Because term limits would pass even the more stringent test of advancing a compelling state interest, *a fortiori*, it would pass constitutional muster under the proper *Anderson* balancing test.

Petitioners next contend that the Act is not narrowly tailored to achieve its goals and suggest that the problem of incumbent advantages can be solved using less drastic measures. Petition at 16-19. Ignoring for the moment that petitioners are again applying the wrong equal protection

test, the Act is indeed narrowly tailored. Petitioners suggest that a lifetime ban is too strict and that the proponents should have imposed a limitation on successive terms only. The proponents rejected limits on consecutive terms because such a ban would only give rise to the problem of "tandem candidates" who would simply trade off running for the same seat every six or eight years.[7] This would not address the state interest in *ensuring* a reduction in inherent incumbent advantages.[8] App. at A-30. The court below held:

> "Realistically, only a lifetime ban could protect against various kinds of continued exploitation of the 'advantages of incumbency' captured through past terms in office. The remainder of petitioners' suggested 'alternatives' essentially involve narrow changes in the system of providing contributions or compensation for legislators, changes that would afford 'career politicians' with independent resources little incentive to voluntarily terminate public service." App. at A-30.

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[7] The court below cited as an example of the phenomenon the circumstance that arose when George Wallace became subject to Alabama's gubernatorial term limits. His wife Lurleen ran in his place and served until her death mid-term. George Wallace was reelected at the end of her term. App. at A-30.

[8] Although the Attorney General and Secretary of State, both themselves subject to term limits, argued for consecutive term limits, petition at 19, intervenor Californians for a Citizen Government, the author of the measure, argued for the lifetime ban, which construction was accepted by the California Supreme Court.

Petitioners then argue that the election process itself is the least drastic alternative: that if voters do not like a candidate, they can vote that candidate out of office. Petition at 19. The California Supreme Court rejected this argument because the incumbent advantages make that statement blatantly untrue. App. at A-29.

The court below relied in part on language in *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom. Moore v. McCartney*, 425 U.S. 927, in which the Virginia Supreme Court upheld a two term limitation on the Governor's Office, specifically rejecting the claim that the law was undemocratic. The court stated:

> "The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure.
>
> " . . . The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls raised fears of an entrenched political machine which could effectively foreclose access to the political process.
>
> " . . . [I]t has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. . . . While elections are won by 51% of the vote, all of the people of a state must be served. Meretricious policies which sacrifice the well-being of economic, social, racial, or geographical

> minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine." *Id.* at 611-12 (citations omitted).

Numerous states impose term limitations on government officials,[9] and the United States Constitution itself imposes a lifetime two term limitation on the office of the Presidency. If such limitations were undemocratic, they would not likely be so pervasive. *See* Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 Ohio St. L. J. 773 (1988).

The court below held that "many, if not all, of the considerations mentioned in *Maloney* (*e.g.*, eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch." App. at A-27. The court concluded that *Maloney*'s analysis was pertinent to the decision before it, and that "permanent incumbency limitations are supported by legitimate and compelling considerations." App. at A-28.

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[9] The following states have term limitations on governing officials: Alabama, Alaska, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d at 587, *cert. denied*, 397 U.S. 149.

Further, such limitations do more than prevent entrenched incumbencies. They ensure a continuing diversity in the management and running of government. Running for office traditionally has been viewed as a civic duty and honor. Farmers, business men and women, and retired persons are encouraged to run for office, bringing with them the benefit of their particular experience and viewpoint, and a desire to contribute to the growth of the constituency they serve. After completing public service, each would then step back to allow others to do the same. This process ensures a wide range of political opportunity for the citizenry and a large scope of experience from which to evolve and enhance the art of governance: "Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic." Tribe, *American Constitutional Law*, § 13-18, at 1097 (2d ed. 1988). Hence, the limitations reflected by the Act promote the democratic process and is in the public interest.

Petitioners argue that term limits were enacted to "remove incumbents based on the content of their message and the way in which they vote," resulting in a situation where "[a]nyone with fresh ideas is welcome. Those whose 'old ideas' are the fruits of experience are not." Petition at 13. Nothing in the Act, either facially or as applied, restricts speech on the basis of content. New candidates may well have old ideas. New candidates may still be sponsored by special interest groups. Nothing in the Act prevents that. And if *new* candidates with old ideas who cater to special interest groups cannot get

elected, that again evidences the People's contention that the only reason *old* candidates with old ideas who cater to special interest groups get elected is because of the advantages inherent in the incumbency.

A balancing of any injury caused to petitioners against the interest of California in enacting the Political Reform Act of 1990 demonstrates that the state's interest substantially outweighs any incidental burden on petitioners' rights. Petitioner-legislators have no fundamental right to hold office indefinitely; and voters are not prevented from voting for another candidate who shares their views.

> "[I]t would be anomalous to hold that a statewide initiative measure aimed at 'restor[ing] a free and democratic system of fair elections,' and 'encourag[ing] qualified candidates to seek public office' (Cal. Const., art. IV, § 1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency." App. at A-31.

In view of the state's weighty interest in preserving and encouraging diversity in government and in preventing entrenched incumbencies, petitioners' arguments are without merit and the petition for certiorari should be denied.

C. The Political Reform Act of 1990 Does Not Violate the Bill of Attainder Clause

Article I, Section 10, Clause 1, of the United States Constitution states "[n]o State shall . . . pass any Bill of

Attainder." The test for a bill of attainder is whether a legislative act applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315 (1946) (congressional prohibition of payment of salaries to three named federal employees because engaged in subversive activities violated bill of attainder clause). Furthermore, this Court has applied a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977).

The California Supreme Court held that Proposition 140 met none of the three possible tests for a bill of attainder violation: neither the historical, functional, nor motivational tests were met. App. at A-33. The historical test was not even implicated because no cases involving term limits as punishment exist. *Id.* As for the functional test, the court below held that "the measure itself expresses broad, *nonpunitive* purposes, namely, '[t]o restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office' by limiting 'the powers of incumbency.' (Cal. Const., art. IV, § 1.5.)" App. at A-33 (emphasis in original).

The Act cannot remotely be described as a bill of attainder. Evaluated in terms of its asserted purposes, the Act must be held to be an act of nonpunitive policy making. It is not a partisan measure; it equally limits terms of Republicans, Democrats, and Independents. The Act does not discriminate on length of service; it limits

terms of legislators who have served for over two decades as well as those who have served only a single term. It limits terms of legislators who opposed passage of the Act, and those who supported it. The Act does not single out any particular legislator or any particular group of legislators as subject to its provisions. As the court below noted:

> "[T]he ballot arguments contain no indication of an intent to *punish* those individuals for any particular past misconduct. Broad reform measures are frequently prompted by particular acts or circumstances involving specific individuals, but in our view such measures would not constitute improper bills of attainder unless an intent *to punish* such individuals clearly appears from their face, or from the circumstances surrounding their passage." App. at A-34 (emphasis in original).

If petitioners are claiming that the entire state Legislature plus the constitutional offices affected by the Act compose a discrete group subject to punishment, then they are expanding the case law beyond its stated boundaries:

> "[T]he prohibition against bills of attainder, it surely was not intended to . . . invalidat[e] every Act of . . . the States that legislatively burdens some persons or groups but not all other plausible individuals. . . . [W]hile the Bill of Attainder Clause serves as an important 'bulwark against tyranny,' . . . it does not do so by limiting [States] to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." *Nixon*, 433 U.S. at 471 (footnotes omitted; citations omitted).

The Act was intended not to punish petitioners Brown and Roberti, but to address fundamental ills in the state's system of governance. Petitioners Brown and Roberti were featured in the campaign in support of the Act for the simple reason that they have high visibility positions, significant political power, and statewide name recognition. It is perhaps a measure of the attitude of the long-term politicians petitioning this Court that they believe the People of California passed an Act affecting 120 legislators, state constitutional officers, the legislative budget, and the legislative pension plan just to remove two individuals from office. The Act simply does not translate into the type of personalized punishment prohibited by the United States Constitution.

Moreover, none of the cases cited by petitioners are remotely analogous to the context presented here. In each of those cases this Court noted that the manifest purpose of the prohibition of bills of attainder is to control the power of the Legislature to punish individuals or a discrete group of people for certain attributes or associations. The Act in issue here is antithetical to this idea. The Act was enacted by the People to control their own representatives. The court below held that " ' "[i]t is clear that general legislation such as this . . . *aimed at the office* . . . rather than the incumbent office holders, has none of the objectionable attributes of a bill of attainder." ' " App. at A-34 (emphasis in original).

A key point was made by the petitioners themselves: " 'The deprivation of any *rights* . . . may be punishment.' " *United States v. Brown*, 381 U.S. 437, 448 (1965) (emphasis added) (law making it a crime for members of Communist Party to serve as officers of labor unions violates bill of

attainder clause). Petition at 21. Residents of California may run for office and once elected, barring any specific disqualifications, they may continue to serve. But that right to serve exists only so long as they discharge the terms of their employment. Because sovereignty resides in the People of California, the People have the right to alter those terms of employment. Legislators serve at the will of the People, not at their own pleasure.

Petitioners have failed to show that the Act was aimed solely at specific individuals, that it was motivated solely by the desire to punish specific individuals, or that punishment is the effect of the passage of the Act. The court below concluded that

> "[a]lthough it is unquestionable the proponents sought to limit the terms of incumbent legislators, including such long-term legislators as Brown and Roberti, we find no evidence of an intent to single out and *punish* those individuals for any supposed misconduct on their part. Accordingly, we conclude that Proposition 140 does not constitute a bill of attainder under the federal Constitution." App. at A-34 (emphasis in original).

Therefore the bill of attainder claim made by petitioners is meritless and the petition should be denied.

CONCLUSION

The freedoms of speech and association guaranteed to all Americans by the First and Fourteenth Amendments are vital rights that must be zealously protected by this Court. It is equally within the mandate of this Court

to uphold the Constitution so as to protect our precious freedoms from subversion for personal gain and the self-interest of legislators at the expense of the governed. The People of California have made clear their position: term limits properly and effectively further the fundamental policies of a representative democracy. The Political Reform Act of 1990 represents the People's selection of a particular type of governmental reform to solve significant problems in their state's government. It was not an attempt to "punish" any particular person.

The nominal "representatives" of the People who chose to challenge this reform have lost at the polls and in the state's highest court. They now petition this Court as a means to escape the will of the People. The arguments presented have no more force now than when rejected by the People and the Supreme Court of California. The petition for certiorari should be denied.

DATED: February, 1992.

Respectfully submitted,

RONALD A. ZUMBRUN
*JOHN H. FINDLEY
*Counsel of Record
DEBORAH J. MARTIN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Respondent,
Californians for a
Citizen Government

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In the Supreme Court

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OCTOBER TERM, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

MARCH FONG EU, et al.,
Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

REPLY BRIEF OF THE LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL. TO OPPOSITION BRIEFS OF RESPONDENTS CALIFORNIANS FOR A CITIZEN GOVERNMENT AND MARCH FONG EU

JOSEPH REMCHO*
ROBIN B. JOHANSEN
WENDY S. STRIMLING
JOHN A. LEWIS
REMCHO, JOHANSEN & PURCELL
220 Montgomery St., Suite 800
San Francisco, California 94104
Telephone: (415) 398-6230
Attorneys for Petitioners

*Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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Petitioners reply herein to oppositions to the Petition for a Writ of Certiorari by both respondent Californians for a Citizen Government and respondent March Fong Eu. The former opposition concentrates on rhetoric, the latter dramatically shifts position as to the applicable standards and raises new issues that have no bearing on whether certiorari should be granted. Both briefs illustrate the very confusion that respondents claim does not exist.

On the critical points, however, there is agreement. Both respondents concede the importance of the term limit issue and that this Court will ultimately have to decide that issue. They would just prefer that the Court not review term limits in the context of this case. But, as the Petition for Writ of Certiorari

demonstrates, this is precisely the case that best focuses the issues, and now is the time to decide them.

I

THE CALIFORNIANS FOR A CITIZEN GOVERNMENT BRIEF DEMONSTRATES THE NEED FOR CERTIORARI

Respondent Californians for a Citizen Government argues that the test enunciated in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) is not a form of strict scrutiny, but rather nothing more than a balancing test for ballot access cases. Brief of Respondent, Californians for a Citizen Government, In Opposition [hereinafter "CCG Opp."] at 6. The California Supreme Court below agreed. Slip Op. at 34, App. A to Petition for a Writ of Certiorari to the California Supreme Court [hereinafter App. A] at A-22. And respondents correctly note that the Ninth Circuit in *Erum v. Cayetano*, 881 F.2d 689, 692 n.7 (9th Cir. 1989), read *Anderson* not to require strict scrutiny. CCG Opp. at 7.

The California Supreme Court purported to "apply" the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), without recognizing, as this Court consistently has, that the balancing test is itself strict scrutiny. *See, e.g., Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J. concurring) (finding phrases such as "least drastic means" unhelpful, but concurring in Court's use of strict scrutiny). The *Anderson* test is no different from that used in *Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 183-186 (1979), and in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989), a decade later. They all require strict scrutiny. The formula in *Illinois State Board of Elections* begins with what appears to be a balancing test: "we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification." 440 U.S. at 183.

Anderson does the same:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.
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> 460 U.S. at 789.

The test does not end there, however. In *Illinois State Board of Elections*, the Court went on to require a compelling state interest, and noted that finding "the least drastic means" was "particularly important where restrictions on access to the ballot are involved." 440 U.S. at 184-85. Although the Court did not discuss particular less drastic alternatives in *Anderson*, the Court concluded the *Anderson* opinion by citing precisely that doctrine as the basis for rejecting Ohio's filing deadline:

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it a *less drastic* way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.
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> 460 U.S. at 806 (quotations and citations omitted; emphasis added).

Anderson is therefore in harmony with the application of strict scrutiny in *Eu*, where this Court unequivocally held that in election cases, strict scrutiny must be applied:

> To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive

> constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest.
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> 489 U.S. 214, 222 (1989) (citations omitted)

Only last month, this Court recognized the intimate relationship between the tests enunciated in *Illinois Elections Board* and *Anderson*, at least with respect to political parties, noting that the Court has required "any severe restriction" on access of new parties to the ballot "to be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, ___ U.S. ___, 112 S.Ct. 698, 705 (1992).

The problem is not just that the California Supreme Court failed to recognize that *Anderson* does in fact require strict scrutiny. Slip Op. at 34, App. A at A-22. The court also failed to recognize the legitimacy of the First Amendment issues, illustrated by its statement that Proposition 140 "does not affect speech interests." Slip. Op. at 31, App. A at A-20. The California Supreme Court's off-handed reference to "less drastic alternative" noted by the Attorney General in opposition cannot obscure the state court's express dismissal of strict scrutiny, its utter failure to seriously consider a less restrictive alternative to a lifetime ban on further service, and its heavy reliance on the Georgia and West Virginia executive term limit cases that applied a rational basis test. Slip Op. at 31, 34, 40-49, App. A at A-20, 22, 26-31.

The lower courts are badly in need of guidance as to the relationship of the *Eu* and *Anderson* standards. They particularly need that guidance in the context of term limits, which profoundly and permanently affect the right of voters to vote for the candidate of their choice. The California Supreme Court recognized this need when it attempted to deal with the right of candidacy, "[l]acking any more specific guidance from the high court, . . ." Slip. Op. at 34, App. A at A-22. That court also found that "it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure." Slip Op. at 39, App. A at A-25.

It is particularly important to consider these issues here, where the question of the appropriate standard of review is raised in the context of a lifetime ban on running for office. Term limits are clearly the most difficult and important election issue of the nineties and one that state and lower federal courts will grapple with throughout the decade. California's lifetime ban on further service is an extreme version of term limits. If the California Supreme Court's application of the *Anderson* test is correct, then term limits of whatever duration or hostility to representative government may be imposed at will. If the First Amendment is to be given any serious consideration at all, however, a lifetime ban must fall: it is not narrowly tailored to meet the measure's stated goals.

Of equal importance is the degree to which the decision below —if left to stand—oppresses the rights of California voters and candidates. There is no justification for a lifetime ban. Nor is there room, in a representative democracy, for voters outside of a candidate's district to dictate who the voters of that district may vote for.

II

THE ATTORNEY GENERAL'S DRAMATIC REVERSAL OF HIS LEGAL POSITION DEMONSTRATES THE NEED FOR CERTIORARI

In his brief to the California Supreme Court the Attorney General wrote that this Court appeared to have settled on a "definitive" test to evaluate the constitutionality of a state election law. Brief of Respondent March Fong Eu at 26. He stated:

> If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest [citations], and is narrowly tailored to serve that interest.
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> *Id.* at 26-27, quoting *Eu*, 489 U.S. at 222.

In addition, the Attorney General wrote:

> Respondent agrees with petitioners that a lifetime ban on candidacy is not essential to accomplish the voters' purpose

> of preventing the development of an entrenched and self-perpetuating political machine in the Legislature. *Reasonably construed to require only a hiatus in multiple successive terms of office, Proposition 140 accomplished the voters' evident purpose in a manner that is less intrusive of constitutionally protected rights.*
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> *Id.* at 26 (citation omitted, emphasis added).

The Attorney General had one strategy in the California Supreme Court—to convince the court to construe Proposition 140 to be a consecutive, rather than a lifetime ban. The Attorney General recognized that a lifetime ban was virtually indefensible, relegating his defense of it to a footnote. *See Id.* at 39 n.21.

Here, the Attorney General takes the position that something short of strict scrutiny is required and that even under strict scrutiny a lifetime ban is the least drastic alternative to achieving California's stated goal of reducing the power of incumbents. Opposition to Petition for Certiorari [hereinafter "Eu Opp."] at 15-17. The Attorney General, however, can barely bring himself to say why a lifetime ban is necessary to achieve the purpose of limiting incumbent power.

The Attorney General was correct below. The only reasonable way to save term limits, if they can be saved at all, is to construe them to be consecutive. Because the clear language of Proposition 140 made it impossible for the California Supreme Court to so construe the limits, the Attorney General is reduced in this court to altering his legal position to fit the decision below, a decision that it clearly inconsistent with this Court's First Amendment jurisprudence.

As we have discussed above and in the Petition for a Writ of Certiorari, the Attorney General's about-face illustrates the difficulty of applying the *Anderson* test without some clarification from this Court of the way in which *Anderson* and *Eu* interact, particularly with respect to the application of term limits.

III

THE MATTER IS RIPE FOR REVIEW

The Attorney General argues that some of the petitioners lack standing and that the matter is not ripe for review. Eu Opp. at 7-14, 18-25. The standing argument is little more than a theoretical exercise because, as the Attorney General concedes, there are ample voters and candidates who are parties and who have unquestioned standing.[1]

The ripeness claim marks another sharp reversal in legal position for the Attorney General, who "urge[d]" the California Supreme Court to take review. Preliminary Response of Respondent March Fong Eu at 2. He stated:

> Inasmuch as the petition presents issues of great public importance that should be resolved promptly and authoritatively and inasmuch as these issues may be decided upon uncontroverted facts, the Court should entertain the petition in the exercise of its original jurisdiction.
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> Id. at 6 (citations omitted).

The Attorney General was correct below. The uncontested declarations below, now dismissed by the Attorney General as not controlling, demonstrate that the effect of term limits is immediate. Officeholders now look at short term legislative solutions, not long term solutions. They may be forced to take job opportunities they would not take in the absence of term limits. The

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[1] The Attorney General challenges the standing of only 10 of the 31 petitioners. The Attorney General challenges the standing of the Legislature, the Senate, the Assembly, the California Teachers Association, the Black American Political Association, Gary Hart, Alice Huffman, A. Alan Post, Deborah Seiler, and Steve Thompson. Eu Opp. at 25.

The Attorney General does not challenge the standing of legislators and voters David Roberti, Willie L. Brown, Jr., Kenneth L. Maddy, William A. Craven, Ed Davis, Cecil Green, Bill Lockyer, Dan McCorquodale, Robert B. Presley, Diane Watson, Bruce Bronzan, Peter R. Chacon, Jim Costa, Dan E. Hauser, Johan Klehs, Barbara Lee, Lucille Roybal-Allard, Aurora Castillo, Marshall Sharpe, Percy Steele, and Newton Wallace.

ripeness of this case is dependent not so much on the effect on petitioners of what will happen in 1994 or later, but rather on how petitioners will conduct themselves between now and then.

As the Speaker of the California Assembly testified in an uncontested declaration below:

> The devastating impacts of Proposition 140 are already being felt in the Assembly. Many members are reconsidering whether they will seek reelection in 1992. Rather than participating fully in the process of developing legislation to address the problems of the state, some members are inevitably preoccupied with consideration of other employment. Moreover, policy objectives that require many years to develop cannot even be considered by legislators who know they cannot be here to see them through. In short, the effect of term limits is already being felt.
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> Declaration of Willie L. Brown, Jr. at Par. 7.

Further, the Attorney General's claim that no one will be affected until at least 1996 is simply wrong. Indeed, the Attorney General notes that petitioner David Roberti, who has been in the Senate for more than twenty years and has served as President Pro Tempore for ten years, would be permitted to serve only the remaining two and one-half years of the term he now seeks after redistricting. Eu Opp. at 12 n.14. Although Proposition 140 permits everyone else to remain in office until 1996, petitioner Roberti will be able to run only in 1992 and not again in 1994 or later.[2] Senator Roberti, who has served southern California for more than two decades, will almost certainly be elected in the special election on April 7, 1992. As soon as he is elected, however, he becomes a lame duck, barred for life from running for re-election in 1994 or ever again.

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[2] As a member of the Senate in 1990, Senator Roberti is permitted to run for only one more term, including the unexpired term for which he is now running. Cal. Const. art. XX, § 7. If the constitutionality of Propostion 140 and this provision is upheld, Senator Roberti will not be permitted to run, as he otherwise would, in 1994.

CONCLUSION

The Petition for a Writ of Certiorari to the Supreme Court of California should be granted.

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Respectfully submitted,

JOSEPH REMCHO*
ROBIN B. JOHANSEN
WENDY S. STRIMLING
JOHN A. LEWIS
REMCHO, JOHANSEN & PURCELL
Attorneys for Petitioners

*Counsel of Record